IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1475

UNITED STATES STEEL CORPORATION,
Defendant-Petitioner,

and

UNITED STEELWORKERS OF AMERICA, et al.,
Defendants-Respondents,

v.

JOHN S. FORD, et al.,
Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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The petitioner, United States Steel Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 8, 1975.

OPINIONS BELOW

The opinion of the District Court is reported at 371 F.Supp. 1045, and set forth at A. 42. The opinion of the Court of

Appeals is reported at 520 F.2d 1043 and is set forth at A. 75. The Court of Appeals' clarifying opinion issued on denial of rehearing is set forth at A. 103, and is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1975. A timely petition for rehearing and rehearing *en banc* was denied on January 14, 1976, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a person has standing to represent a class on appeal when he does not appeal for himself?

2. Whether Federal Rules of Civil Procedure (F.R.C.P.) Rule 23(c)(1) authorizes the substitution of new plaintiff class members and the addition of new defendants, where these class alterations are (1) after trial at judgment and (2) without notice or a hearing?

3. Whether the decision below by permitting the addition of a large number of previously unidentified persons to an ongoing class action after the expiration of the statutory time limitation on filing suit, conflicts with the class action tolling rule enunciated by this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) and with the decisions of other courts of appeals?

4. Whether the Fifth Circuit's continued adherence to the "special circumstances" test in Title VII back pay determinations, comports with this Court's decision in *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2362 (1975) and with the decisions of other courts of appeals?

5. Whether a district court may in its equitable discretion consider difficulty of ascertaining a sufficient causal connection between the employer's conduct and alleged damages, and difficulty of ascertaining any amount of back pay lost by a particular claimant as a result of employer conduct, in determining the propriety of an award of back pay under Title VII?

6. Whether a district court may in its equitable discretion in part consider employer good faith, lack of notice of alleged discrimination, and reliance on the state of the law in determining the propriety of an award of back pay under Title VII?

STATUTES INVOLVED

The statutes involved herein are Title VII to the 1964 Civil Rights Act, *as amended*, 42 U.S.C. §§ 2000e-5 and 6 (A. 105), and 42 U.S.C. § 1981 (A. 121). Also involved are Rules 23 and 25 of the Federal Rules of Civil Procedure (A. 122).

STATEMENT OF THE CASE

On October 7, 1966, respondent John Ford, an employee of the Pratt City Car Shop at the Fairfield Steel Works,[1] filed a clearly described private class action for himself and a small class of Rail Transportation employees,[2] all members of Local

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[1] The Fairfield Works is one of the largest units of United States Steel Corporation and consists of nine separate facilities in Jefferson County, Alabama. Two plants process raw materials (Ore Conditioning; Coke and Coal Chemicals); two are basic steel-producing facilities (Ensley and Fairfield); and four make finished products (Tin; Wire; Sheet; Bessemer Rolling). The ninth facility provides rail transportation services for the other eight (Rail Transportation). *See* A. 43.

[2] The Ford complaint, filed on October 7, 1966, defined the class as black persons "in the Rail Transportation Department" who were "members of Local 1733." A. 3. An amendment to the com-

1733, United Steelworkers of America, against petitioner, the United Steelworkers of America, and Local 1733 (U.S.W.A.), alleging Section 1981 and Title VII violations. Mr. Ford's class was certified by the District Court on August 2, 1967, as consisting of the thirty-five employees described in his complaint,[3] and subsequently in all pleadings, motions, pretrial hearings, discovery, orders, and evidence was treated by the District Court, all plaintiffs, and all defendants, as limited to these thirty-five employees.

Eventually, Ford's class action and the *McKinstry* and *Hardy* class actions filed a few months before Ford's were consolidated for trial with three other private class actions, these six consolidated private cases involving a total of 464 black employees.[4]

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plaint filed September 29, 1967 stated that the action was brought on behalf of blacks "employed in the Rail Transportation Department." A. 13.

[3] The order dated August 2, 1967 defined the class as consisting of "employees in the Employer's Car Shop, Rail Transportation Department."

[4] Each private class action was filed against petitioner, the United Steelworkers of America, and a local U.S.W.A. union. Other than *Ford*, these actions, their date of filing, class, and local union defendant were:

1) the *McKinstry* class action, May 30, 1966, on behalf of black employees at the Plate Mill Department of the petitioner's Fairfield Plant, with Local 1013 as a defendant;

2) the *Hardy* class action, July 7, 1966, on behalf of black employees at the Blast Furnace Department of petitioner's Ensley Plant, with Local 1489 as a defendant;

3) the *Brown* class action, February 13, 1967, on behalf of black employees of the Maintenance of Way Department of the Rail Transportation and Material Handling Division of petitioner's Fairfield Works, with Local 1733 as a defendant;

4) the *Love* class action, April 15, 1968, on behalf of black millwright helpers at petitioner's Ensley Plant, with Local 1489 as a defendant; and

5) the *Donald* class action, March 24, 1969, on behalf of machine shop hookers in the Shop and Construction Department of petitioner's Fairfield Plant, with Local 1013 as a defendant.

Also consolidated for trial was a government "pattern or practice" suit filed in 1970 seeking injunctive relief and back pay for the approximately 2700 remaining blacks at the Fairfield Works.[5]

The consolidated trial of these cases began in June, 1972. A jury trial was requested, but denied. In December, 1972, "after hundreds of witnesses, more than 10,000 pages of testimony, and over ten feet of stipulations and exhibits (the bulk being in computer or summary form),"[6] the parties rested.

Five months after trial, the District Court awarded back pay to sixty-one members of the *Ford*, *McKinstry*, and *Hardy* class actions. The District Court denied back pay in the other three private class actions. Furthermore, in its decision, for the first time, without pleading, notice, or hearing, it summarily created a "new" *Ford* class consisting of all black employees at Fairfield prior to January 1, 1973, who were not otherwise represented in a private class action (i.e., the pattern or practice group), and added eleven (11) local unions as additional defendants to this new class action. The pattern or practice group, or the new *Ford* class, was denied back pay.[7]

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[5] The government "pattern or practice" action was filed on December 10, 1970, under § 707 of Title VII, 42 U.S.C. § 2000e-6, and named as defendants, petitioner, the United Steelworkers of America, and Locals 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662, and 4203, United Steelworkers of America.

[6] A. 43.

[7] The District Court's decree defined the *Ford* and "new" *Ford* class as:

> [A]ll black persons who have at any time prior to January 1, 1973, been employed in the former Pratt City Car Shop line of promotion; and, *for the purpose of this Decree*, the plaintiffs herein represent a class consisting of all black persons who have at any time prior to January 1, 1973, been employed at the Fairfield Works (except to the extent they may be otherwise included as a class member under subparagraphs (a)

The District Court denied back pay in its equitable discretion after finding an insufficient causal connection between petitioner's allegedly wrongful conduct and any amount of damages alleged to be a result of that conduct. The District Court further considered in its equitable discretion the good faith efforts of petitioner to comply with Title VII, petitioner's lack of notice of alleged discrimination, and reliance on the state of the law.

The government appealed the denial of back pay, but later withdrew its appeal in favor of the nationwide steel industry settlement in *United States v. Allegheny Ludlum Industries, Inc., et al.*, 517 F.2d 826 (5th Cir. 1975). Mr. Ford appealed the back pay issue for the new *Ford* class without appealing for more back pay for himself or his original class.

The Fifth Circuit rejected petitioner's arguments that Mr. Ford had no standing to appeal for a class of persons when he did not appeal for himself, and that the creation of the new *Ford* class was improper. The Court of Appeals further reversed and remanded the District Court's denial of back pay to the new *Ford* class, and issued guidelines to the court to consider on remand.

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through (f) [these being persons represented in the private class actions]). (Emphasis added)

A. 38.

The Fifth Circuit described the District Court's creation of the "new" *Ford* class as:

> The substitution was accomplished by Judge Pointer in the May 2 decree, wherein he summarily enlarged the "original" *Ford* class so as to include in a F.R.Civ.P. 23(b)(2) class action judgment all blacks employed at Fairfield prior to January 1, 1973 who were not otherwise represented in a private class action. Thus, the district court designated in practical and legal effect a "new" *Ford* class.

A. 77.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of This Court on Standing.

The Fifth Circuit disposed of the question of Mr. Ford's standing on appeal with the simple ruling, "Initially, we reject appellee United States Steel's argument that appellant Ford lacks standing as a matter of law to represent any class of black employees broader than the 'original' *Ford* class, in which his personal back pay claim has been satisfied." A. 85. In so doing, the Court of Appeals rejected the legal proposition that in order to have standing a class representative must have a personal stake in the controversy and be a member of the class he purports to represent. The emasculation of previous rulings of this Court on standing by the Fifth Circuit's failure to dismiss the instant appeal of a class representative who appealed for a class of employees, but not for himself, merits the grant of certiorari to review the judgment below.

The lack of personal interest and class membership of class representative Ford on appeal is clear. In the District Court's decree Mr. Ford and other employees at the Pratt City Car Shop were certified as members of a class action (original *Ford* class). Mr. Ford, who was awarded back pay, neither appealed for himself nor for his original class. *See* Ford's Notice of Appeal to the Fifth Circuit, A. 73. However, Mr. Ford did appeal as purported representative of the separate and different class certified by the District Court (new *Ford* class) that consisted of the government pattern or practice group of which Mr. Ford was not a member by the District Court's class definition, which Mr. Ford never previously sought to represent, and which was denied back pay by the District Court.

A serious constitutional question is presented by the Fifth Circuit allowing an appeal by a class representative who re-

ceived a satisfactory adjudication of his claim, does not appeal for himself, but nevertheless attempts to prosecute an appeal on behalf of a class of persons other than himself. Such a representative cannot be a proper party plaintiff or appellant where the relief he seeks for the class would be of no benefit to him personally.

This Court has written on standing:

> "The 'gist of the question of standing' is whether the party seeking relief has '*alleged such a personal stake in the outcome of the controversy* as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 304, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

U.S. v. Richardson, 418 U.S. 166, 173 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) (emphasis added). How can a person who does not appeal for himself, in appealing for a class of others, have this requisite personal stake in the outcome of the controversy?

Specifically regarding class actions, this Court has consistently held that in order to have standing a class representative must be a member of the class he seeks to represent. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972) ("Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others."); *Hall v. Beals*, 396 U.S. 45, 49 (1969) ("The appellants 'cannot represent a class of [which] they are not a part.' "); *Bailey*

v. Patterson, 369 U.S. 31, 32-33 (1962) (same). A representative who receives back pay, does not appeal his award, yet appeals for those who received no back pay, is not a member of the appellant class. He is an officious volunteer with no personal interest and no standing.

2. The Decision Below Raises Significant and Recurring Problems Concerning the Scope of F.R.C.P., Rule 23(c)(1).

The Fifth Circuit held, regarding the District Court's summary creation at judgment of a new *Ford* class consisting of all blacks employed at Fairfield prior to January 1, 1973, who were not otherwise represented in a private class action (the government pattern or practice group), and the addition of eleven (11) local unions as defendants to this new class, "[n]or do we accept the argument that the designation of a 'new' *Ford* class constituted inherent error or an unauthorized substitution of parties." The Court of Appeals further decided:

> Rule 23(c)(1) does require the court to determine the propriety of a class action "[a]s soon as practicable" after its commencement, but the rule adds that the order "may be conditional, and may be altered or amended before the decision on the merits." . . . The modification itself is not unique in either its purpose or its timing. It is literally authorized by Rule 23, provided other constitutional and procedural safeguards are satisfied.

A. 85. In permitting, under Rule 23(c)(1), a massive substitution of parties by the District Court, which created the new *Ford* class at judgment without notice or a hearing, the Fifth Circuit has raised serious questions deserving of this Court's consideration on certiorari regarding the scope and meaning of that Rule.

Initially, the recent trial court practice, engaged in by the District Court in this case, of altering class action certifications

at judgment appears contrary to the terms of Rule 23(c)(1), which provides in pertinent part, "An order under this subdivision may be conditional, and may be altered or amended *before the decision on the merits.*" F.R.C.P., Rule 23(c)(1) (emphasis added). *See, e.g., Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1207 (7th Cir. 1971) (dissenting opinion of Judge Stevens, now Justice Stevens). How can a class action determination at judgment be "before the decision on the merits" within the terms of Rule 23(c)(1)? This practice of certifying classes at judgment is directly analogous to the formerly widely used procedure of failing to distribute notices to individual class members in Rule 23(b)(3) class actions, a practice which was engaged in despite the express terms of Rule 23(c)(2), and was corrected by this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Moreover, beyond the terms of Rule 23(c)(1), the District Court's substitution of 2700 new plaintiff class members for a class consisting of 35 members and addition of eleven (11) new defendants, without notice and a hearing and after trial at judgment, is suspect on pure constitutional due process grounds. Since Rule 23(c)(1) class alterations and amendments dictate who will be bound by the res judicata effect of the action, some due process protections are, of course, necessary. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940). The Fifth Circuit, while voicing this fundamental principle in its opinion, however, has determined that a motion, notice, or a hearing is *not* required, without specifying or even hinting what constitutional protections are mandatory under Rule 23(c)(1). Such determination is ripe and necessary for this Court's guidance.

Finally, it is highly speculative and deserving of this Court's attention whether Rule 23(c)(1) is broad enough to authorize the complete substitution of plaintiff class members by the District Court in creating the new *Ford* class, even if said substitution had been achieved before a decision on the merits and

with proper constitutional protections. A complete substitution of the party plaintiff is not authorized by Rule 25, and no case has been found where it was permitted or even attempted under Rule 23(c)(1) prior to the decision below.

The proliferation of class action suits over the past ten years is a matter of judicial notice. In view of this increased use of and need for clarification of Rule 23, the decision below warrants the grant of certiorari to decide the meaning of the "before a decision on the merits" provision of Rule 23(c)(1), to specify procedural due process limits under 23(c)(1), and to delineate the scope of permissible class action alterations under this Rule.

3. **The Decision Below Conflicts With the Class Action Tolling Rule Enunciated by This Court in American Pipe v. Utah, and Conflicts With Decisions by Other Courts of Appeals.**

The redefinition of the *Ford* class seven years after the complaint was filed to bring in 2700 new plaintiff class members, conflicts directly with this Court's class action tolling rule enunciated in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974):

> We are convinced that the rule most consistent with federal class action procedure must be that commencement of a class action suspends the statute of limitations *as to all asserted members of the class.* . . . The policies of insuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," (citations omitted) are satisfied when . . . a named plaintiff who is found to be representative of a class *commences a suit and thereby notifies the defendants* not only of the substantive claims being brought against them, but also *of the number and generic identity of the potential plaintiffs* who may participate in the judgment. Within the period set by the stat-

ute of limitations the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation. . . . (Emphasis added).

Id. at 554-55. In summary the *American Pipe* rule is that the filing of a class action complaint suspends the applicable limitations period *only* as to asserted class members of the class capable of being identified by number and generic description *before* the expiration of the limitations period. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (citing *American Pipe*, "commencement of a class action tolls the applicable statute of limitations as to all members of the class").

American Pipe was cited by the Seventh Circuit in a recent social security case as controlling on a tolling issue where a class action complaint was filed and the applicable statute provided that suit had to be brought within 60 days after the mailing of a notice of decision by the Agency (42 U.S.C. §405(g)). *Jimenez v. Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975). Title VII contains an almost identical statutory limitation on the time within which suit must be brought for employment discrimination:

> A civil action may within thirty days (amended to 90 days in 1972) [after notification of conciliation failure by the EEOC] be brought against the respondent.

42 U.S.C. §2000e-5 (1970).[8] Unlike *Jimenez*, however, the

[8] The 30 day (90 day after 1972 amendment) statutory time limitation on filing suit contained in Section 2000e-5 is by its own language mandatory and has been held to be so by every circuit court considering the issue. *See, e.g., Goodman v. City Products*, 425 F.2d 702 (6th Cir. 1970); *Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1025 (9th Cir. 1975); *Archulete v. Duffy's, Inc.*, 471 F.2d 33 (10th Cir. 1973). Speaking to the mandatory nature of this time limitation the Fifth Circuit itself has written:

> There is no room here for liberal or strict statutory construction since it is clear from the language of 42 U.S.C. § 2000e-5 that the thirty-day requirement for the filing of suit is mandatory and jurisdictional.

Genovese v. Shell Oil Co., 488 F.2d 84, 85 (5th Cir. 1973).

The fact that Ford also made claim under § 1981 does not moot this issue. Remedies under the two statutes are different. *See Johnson v. Railway Express*, — U.S. —, 95 S.Ct. 1716 (1975). Claims under § 1981 would be limited by similar reasoning to one year prior to the date the new *Ford* class was created.

Fifth Circuit in the decision below did not even consider, or if considered did not distinguish, *American Pipe*, citing only the district court decision in *Hairston v. McLean Trucking Co.*, 62 FRD 642, 663-64 (M.D. N.C. 1974), as authority. A. 86. *McLean* was decided eleven months prior to this Court's *American Pipe* case.

Prior to *American Pipe* the Seventh Circuit seemed to agree with the Fifth Circuit's conclusion that the filing of any action no matter how limited in scope tolls a statutory limitations period on filing suit for all persons who may later be added as plaintiff class members. For example, in *Sprogis v. United Air Lines*, 444 F.2d 1194, 1201 (7th Cir. 1971), the Seventh Circuit's leading decision prior to *American Pipe* on the issue, a two judge majority held, in effect, that the filing of an individual action for sex discrimination tolled the statute on behalf of a class not created until five years later. Judge Stevens dissented. On remand the District Court concluded that it would be unfair to defendants to allow such a tardy class action, declined to so alter the action, and no further appeals were taken.

In at least two recent decisions the Seventh Circuit has itself cast doubt on the continued viability of its *Sprogis* decision after *American Pipe*. Specifically, the Seventh Circuit in *Jimenez v. Weinberger*, 523 F.2d 689, 698 (7th Cir. 1975), discussing *American Pipe*, cited the dissenting opinion in *Sprogis* with apparent approval, and in *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353 (7th Cir. 1975) the Seventh Circuit stated "[w]e need not assess here the continued viability of [*Sprogis*] in face of

the subsequent Supreme Court opinions in *American Pipe* and *Eisen*."

In addition to recent Seventh Circuit references to *Sprogis*, the decision below directly conflicts with the recent decision by the Tenth Circuit in *Monarch Asphalt Sales Company v. Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975), where persons sought to intervene as plaintiffs in a class action in which they were not members of the class as previously defined by the court and were held barred by the limitations period. The decision below also conflicts in principle with the Fifth Circuit's own prior decision in *Slack v. Stiner*, 358 F.2d 65 (5th Cir. 1966), where it was held that an action filed on behalf of an individual could not be amended after the running of a limitations period to include a class allegation.

In applying *American Pipe* to the instant case, it seems clear that the 30-day limitation period should have been tolled only on behalf of the 35 members of the original *Ford* class, since these persons were the only class members who were or could have been identified by "number" and "generic description" prior to the expiration of the limitations period under 42 U.S.C. § 2000e-5. It is undisputed that the *Ford* class for seven years included only 35 individuals. For at least four years (until the filing of the government pattern or practice action) the defendants (and also seemingly plaintiff Ford) had no notice of any kind that the 2700 members of the new *Ford* class would make any claim against them.

The gross modification of the *Ford* class seven years after expiration of the statutory time limitation on filing suit fails to comport with *American Pipe's* policy "of insuring essential fairness to defendants." 414 U.S. at 766. The Circuit Court below in permitting this modification has, without justification or even discussion, totally disregarded this Court's *American Pipe* holding.

It is submitted that, because the decision below is contrary to the rule enunciated by this Court in *American Pipe*, and contrary to the decisions of other courts of appeals on this matter, a writ of certiorari is justified. Moreover, the manner and extent to which the filing of a class action tolls a federal statutory time limit on filing suit is an issue of such dominant national importance that a writ of certiorari would be justified even in the absence of the conflicts noted above.

4. The Decision Below Regarding Back Pay Conflicts With Decisions of This Court, Decisions of Other Courts of Appeals, and Usurps the Equitable Discretion of the District Court Under Title VII.

A. Title VII provides that if a district court finds that an employer has intentionally engaged in an unlawful employment practice, it "*may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, *with or without* back pay," 42 U.S.C. § 2000e-5(g) (emphasis added). In *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2362 (1975) this Court interpreting the above language vacated the application by the Fourth Circuit of a so-called "special circumstances" test and established the controlling discretionary standard to be used by district courts in Title VII cases to determine when back pay should be awarded or denied.

The district court in *Albemarle Paper* had entered injunctive relief but denied back pay stating two reasons: (1) the defendant had not acted in bad faith and (2) plaintiff's original complaint did not claim back pay and was not amended to include a prayer for back pay until five years after suit was filed. On appeal, the Fourth Circuit reversed the district court, stating that the district court erred because it should have applied the following "special circumstances" test:

> [A] plaintiff or a complaining class who is successful in obtaining an injunction under Title VII should ordinarily be awarded back pay unless special circumstances would render such an award unjust. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973). Finding further that if the "special circumstances" test had been applied by the district court back pay would necessarily have been awarded, the Fourth Circuit directed the district court on remand "to include an award of back pay in its order." *Id.* at 142.

The *Albemarle Paper* defendants petitioned this Court for a writ of certiorari contending that the Fourth Circuit's "special circumstances" test, as applied, abrogated the traditional equitable discretion of a district court to determine whether back pay is appropriate in a particular case. Certiorari was granted, and on review this Court found the "special circumstances" standard inapplicable to a back pay determination, vacated the circuit court judgment, and stated:

> Relying directly on Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 904, 19 L.Ed.2d 1263, the Court of Appeals reversed [the district court], holding that back pay could be denied only in "special circumstances."
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> * * * * * * *
>
> [This] Court held there that attorneys' fees should "ordinarily" be awarded—*i.e.*, in all but "special circumstances" —to plaintiffs successful in obtaining injunctions against discrimination in public accommodations, under Title II of the Civil Rights Act of 1964. While the Act appears to leave Title II fee awards to the District Court's discretion, 42 U.S.C. § 2000a-3(b), the Court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as

> "private attorneys general," were awarded attorneys' fees in all but very unusual circumstances. There is of course an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices.
>
> But this interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U.S.C. §2000e-5(k), see Northcross v. Board of Education, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L. Ed.2d 48. For guidance as to the granting and denial of *backpay*, one must, therefore, look elsewhere.

95 S.Ct. at 2370. *See id.* at 2389 (concurring opinion by Mr. Justice Blackmun) ("Today the Court rejects the 'special circumstances' test adopted by the Court of Appeals . . .").

In place of the "special circumstances" standard, this Court acknowledged the equitable discretion of a district court and concluded that that discretion should be applied in the following manner:

> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that *the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.* (Emphasis added).

95 S.Ct. at 2373. The clear result of the *Albemarle Paper* decision was to signal, at least in those circuits then applying the

"special circumstances" test, an increased deference to a trial court's discretion in equitable matters relating to back pay. *See, e.g., Jurinko v. Wiegland Co.*, — F.2d —, 12 FEP Cas. 203, 207 (3rd Cir. 1975) (*Albemarle Paper's* effect is to "emphasize the equitable nature of an award of back pay in cases under Title VII").

Prior to *Albemarle Paper* three circuits, the Fourth, Fifth and Sixth, had applied the "special circumstances" test. *See, e.g., Albemarle Paper, supra; Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 253 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973). Other circuits had applied a discretionary standard. *See, e.g., Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973); *United States v. St. Louis & S.F. Ry.*, 464 F.2d 301, 311 (8th Cir. 1973), *cert. denied*, 409 U.S. 1116 (1973). Two of the pre-*Albemarle Paper* "special circumstances" circuits, the Fourth and Sixth, have now quietly abandoned that test in favor of the *Albemarle* standard. *See, e.g., Hairston v. McLean Trucking Co.*, — F.2d —, 11 FEP Cas. 91, 94 (4th Cir. 1975); *Draper v. U.S. Pipe & Foundry Co.*, — F.2d —, 11 FEP Cas. 1106, 1111 (6th Cir. 1975).

In the decision below, however, the Fifth Circuit continues to apply the now discredited "special circumstances" test. A. 101 and n.1. Indeed, the Fifth Circuit applied in the decision below, and is applying in other decisions, the "special circumstances" test in a manner even more restrictive on the discretion of a district court than was the Fourth and Sixth Circuit's application of that test before this Court's *Albemarle Paper* decision. In the decision below the Fifth Circuit unequivocally states:

> The only "special circumstance" we have recognized is that of a conflicting state statute which required the employer to violate Title VII.

Id. The decision below discusses for many pages a "two stage" procedure which it directs the District Court to use on remand to determine back pay. A. 86-92. It should be noted that this two stage procedure, outlined in detail by the Fifth Circuit, contains no reference to any point during the procedure at which the District Court is to consider whether to award or deny back pay under the *Albemarle Paper* standards. Instead, the Circuit Court simply states that the necessity of a back pay award is "nearly certain, if not 'automatic or mandatory.'" A. 91.

The Fifth Circuit itself, in the decision below acknowledged that its continued adherence to the "special circumstances" test "perhaps" conflicts with this Court's *Albemarle* decision, but suggests the conflict to be "superficial."

> [P]erhaps, as the union argues, some degree of conflict now exists, *compare Moody, supra*, — U.S. at —, 95 S.Ct. at 2371-72, 45 L.Ed.2d at 296-97, *with Pettway, supra*, 494 F.2d at 253 ["The district court's reasons for denying back pay must next be examined for evidence of 'special circumstances' "], we believe that the inconsistency is superficial to this case.

A. 102. It seems curious that the Fifth Circuit acknowledges a possible conflict with a three month old decision by this Court and then proceeds without regard to its existence, "superficial" or not. But, in any event, the conflict between the Fifth Circuit's continued application of a "special circumstances" test and this Court's *Albemarle Paper* standard cannot correctly be rated "superficial." By only recognizing the single "special circumstance" of a state statute requiring the defendant to violate Title VII as a justification for denying back pay, the Fifth Circuit is totally abrogating the equitable discretion of its trial courts requiring, in effect, mandatory awards of back pay in direct conflict with the opinion and result in *Albemarle Paper*.

B. The Fifth Circuit should have considered the District Court decision in the case at bar under the *Albemarle Paper*

standard, with due regard for the principle stated in *Albemarle Paper* that a district court's exercise of discretion is to be reversed only where "clearly erroneous." 95 S.Ct. at 2375. Upon such proper consideration it should have affirmed the decision of the District Court.

Written two years prior to this Court's *Albemarle Paper* decision, the back pay analysis in the District Court decision is surprisingly similar to the approach specified by this Court as proper in *Albermarle Paper*. The District Court began its analysis with this paragraph:

> Back pay is properly viewed as an *integral* part of the whole of relief, which seeks not to punish the defendant, but to compensate the victim of discrimination. *United States v. Georgia Power Co.*, 474 F.2d 906 (CA 5 1973). *Cf. Moody v. Albemarle Paper Co.*, 474 F.2d 134 (CA 4 1973) (in view of strong congressional policy successful plaintiffs should ordinarily be awarded back pay unless special circumstances would render the award unjust).

A. 60. It then stated that this policy "guides the court in its exercise of equitable discretion." A. 60. *Compare, e.g., Albemarle Paper*, 95 S.Ct. at 2370 ("It is true that back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke.").

Following these general comments, the District Court proceeded to award back pay in three private class actions (a later hearing was held on individual calculations), and to articulate specific reasons for the denial of back pay in the remaining cases.

(1) The first reason specified by the District Court for its denial of back pay was the failure of the evidence to prove economic injury resulting from discrimination, or, as stated by the Circuit Court below, the District Court's "inability to identify and distinguish the various causes of class members'

economic losses." A. 86. The District Court found that although "equity may for purposes of injunctive relief presume damages from the invasion of a legal right . . . compensatory monetary awards [require] . . . proof that the claimant has actually sustained a loss from the defendant's improper conduct." A. 60-61.

At trial in the District Court the government introduced statistics which showed a difference in gross earnings by race. No effort was made by the plaintiffs to analyze the reasons for this difference. They simply asserted that since whites had higher average gross earnings than blacks, back pay was appropriate.

Petitioner accounted for the difference in gross earnings through an exhaustive statistical analysis which revealed numerous factors other than discrimination that contributed to the gross earnings' differential, such as failures to bid into lines of progression,[9] education,[10] voluntary "freezing" within lines of progression in lower-paying jobs,[11] craft training,[12]

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[9] The statistical evidence showed that blacks voluntarily refused to bid on higher paying jobs more often than did whites. In many cases blacks could have obtained higher paying jobs on the basis of their seniority alone had they bid.

[10] Blacks at Fairfield had 2.8 years less formal education than whites. National data showed level of education to be directly related to earning capacity.

[11] Freezing consists of such factors as voluntary requests for demotion to lower paying jobs, refusals of training opportunities for higher paying jobs, and refusals to accept higher paying jobs. The evidence showed that more black employees "froze" themselves into lower paying jobs than did white employees. Most higher jobs involved different, less familiar duties, loss of opportunity to work with familiar associates, and required the initiative that is necessary to assume more responsibility for more money. Some employees of both races were less ambitious than others. Some liked their jobs and did not want to go to the trouble of working harder for more money.

[12] White employees were shown to have on the average 1.02 years of craft training more than blacks.

and education achievement level.[13] The summary of the impact of these factors is contained in Company Exhibit 1013[14] which shows a statistically estimated dollar value for each factor without regard to race, and accounts for the differences in earnings between white and black employees by reasons other than discrimination. The Company study and the plethora of other statistical and testimonial data submitted by defendants at trial are confirmed by the post-trial record required by the District Court to be maintained, compiled, and reported by petitioner.[15]

The Circuit Court, without disputing the District Court's finding that the plaintiffs did not prove a causal relationship between the somewhat lower average earnings for blacks and discrimination by defendants, stated that this rationale "must fail" as a "general" defense. A. 87.

(2) The second, and somewhat related reason stated by the District Court for its denial of back pay was that even if injury to the class were assumed:

> [I]n the particular context of this case the assessment of back pay [to individuals] for pre-1963 discrimination systematically perpetuated . . . would be fraught with speculation and guesswork.
>
> * * * * * * *
>
> If . . . an accurate determination—or even a reasonably accurate estimate—of individual rights is to be the corner

[13] National data showed that for equal years of schooling, a black-white achievement differential existed, to the detriment of the earning capacity of blacks.

[14] A. 16.

[15] The post-trial statistics showed that blacks are voluntarily freezing within lines of progression at a ratio of three times that of whites and at a job class 2.67 job classes lower than whites. The difference in earnings due to an employee freezing at 2.67 job classes lower approximates $555.36 per year.

> stone for back pay awards, then, with the exception of the three specific situations noted, this cannot be done in the present case. . . .

A. 67-68. The Circuit Court, however, rejected this analysis in favor of an initial burden of proof on plaintiffs of only showing a *reasonable inference* of "cognizable [economic] deprivations." A. 91.

The Circuit Court's abrogation of the traditional requirement that a plaintiff prove a causal connection between an alleged damage and a wrongful act by the defendant, and its dismissal through a contrived two step analysis of the District Court's discretionary concern over the speculative nature of individual assessments of back pay raise important and substantial issues warranting review by this Court.

(3) The third reason stated by the District Court for its denial of back pay was the defendant's good faith, reliance on the state of the law, and complete lack of notice of any allegedly discriminatory practices in violation of Title VII and Section 1981.

The District Court noted that prior to its decision the rule which prevailed nationwide and more particularly in the Fifth Circuit was that the lack of plant-service seniority, upon which the government ultimately based its discrimination claims, was *not* a discriminatory practice in the steel industry. This steel industry rule began with *Whitfield v. United Steelworkers of America*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959), a pre-Act case.

In *Whitfield*, the Fifth Circuit approved a 1956 agreement between the union and Armco Steel Corporation whereby segregated lines of promotion were merged and substantial preferential rights were afforded to black transferees. 263 F.2d at 549. In response to objections raised by five black em-

ployees, the court found that the then Armco seniority system as modified was not discriminatory:

> Such a system [as merged] was conceived out of business necessity, not out of racial discrimination. An employee without the proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority.

263 F.2d at 550.

The Fifth Circuit made it clear that the Armco system should serve as a model for steel seniority systems:

> If there is racial discrimination under the new contract, it is discrimination in favor of Negroes.
>
> * * * * * * *
>
> [The company and union] have a contract that *from now on* is free from any discrimination based on race. Angels could do no more.

263 F.2d at 549, 551.

The changes endorsed by the Fifth Circuit in *Whitfield* were instituted throughout the steel industry with few exceptions. In 1962 and 1963, changes were made at petitioner's Fairfield Works which were modeled upon and even exceeded the changes made at Armco.[16]

Whitfield's endorsement of the Armco system was upheld by the first three Title VII decisions involving steel plants on the basis of business necessity. *United States v. H. K. Porter Company*, 296 F.Supp. 40, 66-67 (N.D. Ala. 1968); *United*

[16] LOPs were reorganized and merged, plant wide bidding was used for entry-level jobs, and broad pools were created increasing opportunities and giving protection from layoffs to longer-serviced employees. A. 55.

States v. Bethlehem Steel Corporation, 312 F.Supp. 977 (W.D. N.Y. 1970) (Lackawanna plant of Bethlehem Steel); *Matter of Bethlehem Steel Corporation*, OFCC Dkt. 102-68 (Dec. 18, 1970) (Sparrows Point plant of Bethlehem Steel).

Even the Fifth Circuit observed in the opinion below that until June 21, 1971, the date of the Second Circuit's opinion in *Bethlehem Steel*, the remedy of plant-service seniority was unanimously held inapplicable to the steel industry due to the dangers and complexities of the steel manufacturing process. A. 98. Moreover, until the District Court decision below and the Fifth Circuit's opinion in *H. K. Porter*, 491 F.2d 1105 (5th Cir. 1974), granting seniority benefits between different lines of progression was considered, if anything, discriminatory to whites. *See, e.g.*, 263 F.2d at 550.

Considering this lack of notice of any alleged discriminatory defects in the Fairfield seniority system, the District Court wrote:

> Here, the company—particularly at upper management levels—and the unions—particularly at the international level, and their representatives—have been in the forefront of expanding employment opportunities for blacks. There is no need to recount the evidence which establishes the many initiative steps taken by them to eliminate racial discrimination, albeit still falling short by today's standards. They have modified the employment practices at Fairfield periodically to comply with all legal requirements as from time to time they with reason understood them to be. . . . They had good reason to believe that the seniority system at Fairfield, lauded in Whitfield v. United Steelworkers, 263 F.2d 546 (5th Cir. 1959), also was consistent with Title VII, at least in this circuit. Though not a defense, reasonable good faith efforts at compliance merit some consideration, in equity, particularly where a purpose of back pay awards is to encourage non-judicial solutions.

A. 66-67 (footnote omitted). However, the Fifth Circuit "thoroughly rejected" the District Court's equitable consideration of good faith, reliance on the state of the law, and lack of notice. A. 99.

The decision below, by rebuffing totally the District Court's analysis, is in conflict with this Court's opinion in *Albemarle Paper*:

> Where an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of a highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith opens the door to equity; it does not depress the scale in the employer's favor.

95 S.Ct. at 2374. Furthermore, the Fifth Circuit's decision conflicts in principle with *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4355 (U.S. March 24, 1976). "We are not to be understood as holding that an award of seniority status [or similarly back pay] is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts." 44 U.S.L.W. at 4363.

Additionally, the Fifth Circuit's decision conflicts directly with the Eighth Circuit's opinion in *U.S. v. N.L. Indus., Inc.*, 479 F.2d 354 (1973). In *N.L. Industries*, despite a lengthy analysis and a finding that back pay would otherwise be appropriate, the Eighth Circuit nonetheless denied back pay because of a lack of notice of discriminatory practices by the employer:

> In this Circuit the law in regard to backpay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses due to continuation of past or present discriminatory policies. However, where an employer and union have had ample opportunity to remedy an unlawful employment practice, they should be put on notice that they will be held responsible for the economic losses accruing to the parties injured by such unlawful employment practices.

479 F.2d at 380.

Moreover, the blind imposition of back pay advocated by the Fifth Circuit, upon an employer who did not intentionally engage in alleged unlawful employment practices, who relied upon the clear legal precedent which existed at the time endorsing its employment practices, who willingly took every affirmative action suggested by the law short of instituting LOP reforms which would under the *Whitfield* opinion prove both unfair to skilled workers already in the LOPs and to unskilled workers who would be thrust in positions which they were untrained to fill, is clearly contrary to numerous decisions on retroactivity. For example, the Fifth Circuit itself has denied retroactive application to 42 U.S.C. § 1981, by holding that an award of back pay under § 1981 is inappropriate prior to the effective date of Title VII because "substantial injustice" would result from lack of notice to employers. *Pettway v. ACIPCO*, 494 F.2d 211, 255 (5th Cir. 1974). Recently, the Second Circuit, in an action under the National Labor Relations Act, denied retroactive application to certain new decisions, holding:

> Because Laidlaw and Fleetwood imposed duties on employers which had not theretofore existed, it would be unjust to use those cases to impose [monetary] liability fifteen years after the events at issue transpired.

Machinists v. United Aircraft Corp., — F.2d —, 90 L.R.R.M. 2272, 2296 (2d Cir. 1975).

Aggravating defendant's lack of notice under existing case law is the fact that defendant had no knowledge that respondent Ford would claim back pay for a group larger than 35 persons until 1973, inasmuch as Ford had never purported to represent the

new *Ford* class before judgment. Petitioner had no notice of a back pay claim on behalf of the new *Ford* class, at least until December 1970 when the government filed its action. And the government, of course, withdrew its appeal in favor of the *Allegheny* settlement. This Court in *Albemarle Paper* held under similar circumstances:

> The respondents here were not merely tardy, but also inconsistent, in demanding back pay. To deny back pay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII.

95 S.Ct. at 2375.

Clearly, petitioner was prejudiced by reliance on the state of the law under Title VII and the lack of any back pay claim for the pattern or practice group until almost 1971. The decision below, in refusing to recognize the equitable discretion of the District Court to fashion relief by in part considering employer good faith, lack of notice, and reliance on the state of the law, is contrary to the decisions of this Court, of other courts of appeals on retroactivity, and to the purposes of Title VII itself—to encourage employers and unions to voluntarily endeavor to comply with the Act. *See, e.g., Albemarle Paper,* 95 S.Ct. at 2387-88 (1975) (concurring opinion of Chief Justice Burger). These conflicts warrant review by this Court.

In view of the foregoing, the decision below of the Court of Appeals for the Fifth Circuit should be reversed, and the District Court's decision reinstated. In the alternative, if this Court has any doubt regarding the propriety of the District Court's denial of back pay, it should correct the erroneous standards applied by the Fifth Circuit and remand the case with appropriate instructions.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted

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APPENDIX

ORIGINAL FORD COMPLAINT

In the
United States District Court for the
Northern District of Alabama
Southern Division

John S. Ford, Willie Cain, Willie L. Coleman, Joe N. Taylor, Robert Cain, David Bowie and Earl Bell,
Plaintiffs,

v.

United States Steel Corporation, a Corporation, United Steelworkers of America, AFL-CIO, an Unincorporated Association; Local 1733 of United Steelworkers of America, AFL-CIO, an Unincorporated Association and William A. Daniels, President of Local 1733 of the United Steelworkers of America, AFL-CIO,
Defendants.

Civil Action.
No. CA 66-625.

Complaint

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4) and 42 U.S.C. § 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 U.S.C. §§ 2000e et seq. Jurisdiction of this Court is invoked to secure

the protection of and redress the deprivation of rights secured by 42 U.S.C. §§ 2000e et seq., providing for injunctive and other relief against racial discrimination in employment.

II

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are employed by the United States Steel Corporation at its mills, plants, and/or other facilities located in the State of Alabama and in and around the City of Birmingham, and who are members of the United Steelworkers of America, AFL-CIO, and Local 1733 of the United Steelworkers of America, AFL-CIO, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes in this class who are and have been limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by plaintiffs.

III

This is a proceeding for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of: (a) discriminating against plaintiffs and other Negro persons similarly situated because of race or color with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant United States Steel Corporation who are members of United Steelworkers of America, AFL-CIO, and Local 1733 of the United Steelworkers of America, AFL-CIO,

in ways which deprive plaintiffs and other Negro persons similarly situated of employment opportunities and otherwise adversely affect their status as employees because of race and color.

IV

A. Plaintiffs John S. Ford, Willie Cain, Willie L. Coleman, Joe N. Taylor, Robert Cain, David Bowie and Earl Bell are Negro citizens of the United States, residing in the City of Birmingham in the State of Alabama.

B. Plaintiffs and the class they represent are presently employed in the Rail Transportation Department of defendant United States Steel Corporation's Fairfield Works.

C. Plaintiffs and the class they represent have been at all times material to this action members of defendant Local 1733 of the United Steelworkers of America, AFL-CIO, and through their membership in Local 1733 are members of defendant United Steelworkers of America, AFL-CIO.

V

A. Defendant United States Steel Corporation (hereinafter referred to as "the Company") is a corporation doing business in the State of Alabama and the cities of Birmingham and Fairfield. The Company operates and maintains plants, mills and/or other facilities located in and around the cities of Birmingham and Fairfield in the State of Alabama. The Company is an employer within the meaning of 42 U.S.C. § 2000e-(b) in that the Company is engaged in an industry affecting commerce and employs more than 100 persons.

B. Defendant United Steelworkers of America, AFL-CIO (hereinafter referred to as "the Steelworkers") is a labor organization within the meaning of 42 U.S.C. §§ 2000e(d) and (e)

in that the Steelworkers is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours and other terms or conditions of employment of employees of the Company at its mills, plants and/or other facilities located in various cities and states throughout the United States, including employees of the Company's mills, plants and/or other facilities in and around the cities of Birmingham in the State of Alabama. The Steelworkers has more than one hundred members.

C. The defendant Local 1733 of the United Steelworkers of America, AFL-CIO (hereinafter referred to as "Local 1733") is a local subordinate of the Steelworkers and is a labor organization within the meaning of 42 U.S.C. §§ 2000e-(d) and (e) in that Local 1733 is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes and other terms or conditions of employment of employees of the Company at its mills, plants, and/or other facilities in and around the cities of Birmingham and Fairfield in the State of Alabama. Local 1733 has more than one hundred members.

D. Defendant William A. Daniels is the President and Chairman of the Grievance Committee of Local 1733.

VI

A. All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been at all times material to this action, governed and controlled by collective bargaining agreements entered into between the Steelworkers and the Company and/or local supplemental agreements (hereinafter referred to as "Agreements") entered into between Local 1733 and the Company under and pursuant to the terms of the aforementioned agreement the de-

fendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving the defendants' long-standing policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color.

B. The Rail Transportation Department of the Company, in which plaintiff and the class they represent are employed, is essentially a small railroad company which operates within the confines of the Company's Fairfield Works. This Department consists of three subdivisions: (1) Road Operations, which consists of several hundred Engineers, Firemen, Conductors and Switchmen; (2) Maintenance of Way, which consists of track repairmen and equipment operators; (3) Car Shops, which consists of employees who build and repair railroad cars used by the Company in its operations throughout the Company's complex in and around the cities of Birmingham and Fairfield. The plaintiffs are employees in the Company's car shop department known as the Pratt City Rail Transportation Department of Fairfield Steel.

C. Job classifications in the Pratt City car shop have been given grade numbers which determine the particular job an employee performs and the rate of pay he receives. Job class members range from Job Class 1 through Job Class 14. The rate of pay increases with the Job Class number. Promotion from one Job Class to a higher Job Class is essentially based on the seniority standing of an employee in a given line of promotion. The seniority standing also determines which employees are laid off first in the event of a reduction of the work force.

D. Up to and through part of 1963 the Company maintained segregated seniority lines of promotion based on race. The Negro line of promotion was limited to Job Class 1 through Job Class 6. Negro employees were initially employed as Laborers

in the car shop and could only enter the line of promotion limited to Negro employees. The white line of promotion consisted of Job Class 5 through Job Class 14. All white employees were initially hired in Job Class 5 and were promoted from Job Class 5 directly to Job Class 8. Although there was a Job Class 5 in both the Negro and white lines of promotion, the work performed in Job Class 5 in the white line of promotion was different from the work performed in Job Class 5 in the Negro line of promotion. No whites were employed in Job Class 6. Pursuant to the policy, practice, custom and usage of defendants, Negro employees were precluded from jobs in the white line of promotion on the basis of race.

D. On or about August 5, 1963, the Company and Local 1733 entered into a written agreement which would have the effect of completely merging the separate seniority lines based on race. The merger would have resulted in one line of promotion consisting of all Job Classes theretofore separated on the basis of race. Pursuant to the terms of the August 5, 1963 agreement, there was to be a two-year period in which seniority rights were to be exercised by Negro and white employees in the former segregated lines of promotion only. At the end of the two-year period, from the date of August 5, 1963, Negro employees would have been allowed to bid for any Job Class vacancy in the merged line of promotion, notwithstanding the previous segregated lines of promotion based on race. At the time the August 5, 1963 agreement was executed, the Company was operating at less than full capacity and a number of employees, both Negro and white, were on layoff status.

E. On or about June 3, 1964, at about the time the Company began to recall a number of employees who had been laid off, the Company and Local 1733 executed a subsequent agreement which, in effect, abrogated the terms of the August 5, 1963 agreement. Under the terms of the June 3, 1964, agreement, which is currently in operation, three lines of promotion

were established; lines 1A, 1B and 1C. The 1A line of promotion includes most of the job classes always heretofore limited to white employees, namely, Job Classes 8 through 14. The 1B line of promotion includes two job classifications, both of which are Job Class 5, which were always heretofore limited to white employees. The 1C line of promotion includes the job classifications which had always been limited to Negro employees, namely, Job Classes 5 and 6. Under operation of the June 3, 1964 agreement, Negro employees are purportedly given the opportunity for promotion to jobs 1A and 1B lines of promotion. However, Negro employees must enter at the bottommost job in the 1A and 1B lines of promotion and their seniority standing dates from the time of initial entry into 1A or 1B jobs although some Negro employees have more seniority than many of the white employees in the 1A and 1B lines of promotion.

VII

A. The effect, purpose and intent of the agreement executed by the Company and Local 1733 on June 3, 1964, was to continue and render permanent the advantage that white employees had over Negro workers, which existed prior to August 5, 1963, because of the overt and public discriminatory policy of the defendants. This effect, purpose and intent were continued on and after July 2, 1965 through failure and refusal of the defendants on and after that date to cancel the agreement of June 3, 1964, and still continue to the present time. Plaintiffs believe and allege that the Company and Local 1733 agreed, conspired and acted in unison, and continue to conspire and act in unison, to violate Local 1733's duty under federal law to represent the interest of its Negro members fairly, and honestly and knowingly agreed and conspired, and continue to agree and conspire, to suppress and limit the opportunities of Negro employees to obtain equal employment opportunities with the Company. Plaintiffs believe and allege that the principal mecha-

nism and device of this conspiracy, concert and agreement, is the execution and continued adherence to the June 3, 1964 agreement which abrogated the terms of the August 5, 1963 agreement.

B. Subsequent to the execution of the June 3, 1964 agreement, an ad hoc committee of Negro employees of the Company sought to get a copy of this agreement so as to petition for the assistance of the officers of Local 1733 and the Steelworkers in an effort to present a grievance for the purpose of cancelling the June 3, 1964 agreement. The committee was advised by officials of the Company, the Steelworkers and Local 1733 that no such agreement existed. It was not until months later when a copy of the June 3, 1964 agreement was printed and distributed that the plaintiffs learned, as a matter of fact, that the August 3, 1963 agreement had been abrogated.

C. On or about January 18, 1964 a group of Negro employees filed a complaint pursuant to the grievance procedure set up under the collective bargaining agreement protesting the execution of the June 3, 1964 agreement. On or about January 21, 1965, the grievance petition was returned to the committee by an official of Local 1733 who advised the committee that an official of the Steelworkers had requested that the petition be returned inasmuch as it would violate terms of a contract agreement of September 30, 1964. The failure of the Steelworkers and Local 1733 to actively press the grievance was intended to deny, and had the effect of denying Negro employees fair representation as members of the unions on the basis of race.

VIII

On or about January 6, 1965 the Company posted bids for job classifications in the 1A line of promotion. Negro employees submitted bids for these jobs. However, they were ad-

vised by the Company they would have to take and pass a test before they would be considered for the job vacancies. Heretofore, no test had been administered for promotion purposes in any of the jobs currently listed in the 1A, 1B or 1C lines of promotion. Several of the Negroes who agreed to take the test and were successful have been allowed to fill some job vacancies in the 1A and 1B line of promotion on a temporary basis. Plaintiffs believe and allege that the test is not professionally developed as required under 42 U.S.C. § 2000e-2(h) and that the test, its administration and action upon the results, is intended to discriminate against Negro employees because of race and color.

IX

A. Neither the Company nor either of the defendant labor unions has made any efforts or attempts since June 3, 1964, and through or since July 2, 1965, to correct, modify or disavow the policy, practice, design or purpose perpetuated by the discriminatory agreement of June 3, 1964.

B. All of the practices herein alleged existed prior to and have continued to exist subsequent to July 2, 1965. The way in which the lines of progression are presently structured is intended to discriminate, and has the effect of discriminating against the plaintiffs and the class they represent in ways which deprive plaintiffs and the class they represent of equal employment opportunities because of race and color in violation of 42 U.S.C. §§ 2000e et seq.

X

Plaintiffs and the class they represent are qualified for promotions and for training which could lead to promotion on the same basis as such opportunities are provided for white employees.

XI

The Company maintains racially segregated bath and toilet facilities in violation of Title VII of the Act known as "The Civil Rights Act of 1964", 42 U.S.C. §§ 2000e et seq.

XII

A. On or about February 19, 1966 plaintiffs filed a complaint with the Equal Employment Opportunity Commission alleging a violation by the defendants of their rights under Title VII of "The Civil Rights Act of 1964", 42 U.S.C. §§ 2000e et seq. On July 18, 1966 the Commission found reasonable cause to believe that a violation of the Act as alleged by the plaintiffs had occurred by the defendant. The Commission notified the plaintiffs under date of September 8, 1966 that the Commission had not achieved voluntary compliance by the defendant through conciliation, as provided by Title VII of "The Civil Rights Act of 1964" and that plaintiffs were entitled to initiate a civil action in a United States district court, as provided by § 2000e-5(f) of "The Civil Rights Act of 1964."

B. Neither the State of Alabama, nor the City of Birmingham, nor the City of Fairfield have a law prohibiting the unlawful employment practices alleged herein.

XIII

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendant's policy, practice, customs and usages as set forth herein.

Wherefore, plaintiffs respectfully pray this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants, United States Steel Corporation, United Steelworkers of America, AFL-CIO, Local 1733 of the United Steelworkers of America, AFL-CIO, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing to enforce, give effect to, or operate under the provisions and terms of the June 3, 1964 agreement heretofore described.

2. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants, United States Steel Corporation, United Steelworkers of America, AFL-CIO, Local 1733 of the United Steelworkers of America, AFL-CIO, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from using or agreeing to any seniority agreement other than (a) the August 5, 1963 agreement heretofore described; or (b) a seniority arrangement which recognizes the seniority rights of all employees without regard to race or color.

3. Grant the plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants. United States Steel Corporation, United Steelworkers of America, AFL-CIO, and Local 1733 of the United Steelworkers of America, AFL-CIO, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, customs or usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of the plaintiffs and others similarly situated to enjoy equal employment advancement or training for advancement as secured by Title VII of "The Civil Rights Act of 1964", 42 U.S.C. §§ 2000e et seq.

4. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendant, United States Steel Corporation, its agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing or maintaining the policy, practice, custom and usage of maintaining racially segregated bath and toilet facilities.

5. Allow plaintiffs their costs herein, including reasonable attorneys' fees and other additional relief as may appear to this Court to be equitable and just.

Respectfully submitted

/s/ OSCAR W. ADAMS, JR.
OSCAR ADAMS, JR.
1630 Fourth Avenue, North
Birmingham, Alabama
JACK GREENBERG
LEROY D. CLARK
ROBERT BELTON
10 Columbus Circle
New York, New York
Attorneys for Plaintiffs

AMENDMENT TO THE ORIGINAL FORD COMPLAINT

In the United States District Court
For the Northern District of Alabama
Southern Division

John S. Ford, et al., Plaintiffs,
v.
United States Steel Corporation, et al., Defendants.
} Civil Action No. 66-625

Amendment to the Complaint

Come now the plaintiffs, by their undersigned counsel, pursuant to the Order of the court of August 2, 1967 and herewith file an amendment to their complaint in accordance with the opinion of the court of August 2, 1967 on the designation of the class:

Amending Paragraph II to read as follows:

Plaintiffs bring this action on their own behalf and on behalf of other Negro persons similarly situated, who are employed in the Rail Transportation Department of the United States Steel Corporation, whose promotion and seniority rights are governed by the seniority arrangements which are alleged herein to be structured or maintained in violation of their individual rights and rights of the members of the class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes in this class who are, have been, and continue

to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by plaintiffs.

Amending Paragraph IV to read as follows:

Plaintiffs and some members of the class they represent have been at all times material to this action members of defendant Local 1733 of United Steelworkers of America, AFL-CIO, and through their membership in Local 1733 are members of defendant United Steelworkers of America, AFL-CIO.

This 28th day of September, 1967.

Respectfully submitted,

OSCAR W. ADAMS
1630 Fourth Avenue North
Birmingham, Alabama

JACK GREENBERG
LEROY D. CLARK
ROBERT BELTON
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a copy of the foregoing Amendment to the Complaint has this day been served upon:

Jerome A. Cooper, Esq.
Cooper, Mitch & Crawford
1025 Bank for Savings Building
Birmingham, Alabama 35203

attorneys of record for defendants United Steelworkers of America, AFL-CIO; Local 1733 of United Steelworkers of America, AFL-CIO; and Orville M. Duggan, President of Local 1733 of United Steelworkers of America.

COMPANY TRIAL EXHIBIT 1013

Summary of the Impact of Various Factors on Earnings Differences According to Color

Factor	Estimated Impact of Factor of White-Black Earnings Differential	
	Lower Estimate	Upper Estimate
1. Job Freezing[a]	$80	$137
2. Refusal to Bid[b]	$69	$344
3. Quantity of Schooling[c]	$351	$400
4. Craft Training[d]	$450	$521
5. Corporate Service[e]	($117)	($104)
6. Achievement[f]	$188	$496
Total	$1021	$1794

[a] The estimates for this factor were derived assuming that whites (a) froze at the same rate as blacks and (b) froze at the same job class as blacks. The lower estimate assumes that 7.9 per cent of all white employees froze at job class 5.9 and that their earnings were therefore reduced by $1014, the differential between the projected earnings of the average white freezees and the projected earnings for job class 5.9. The 7.9 per cent multiplied by $1014 yielded the lower estimate of $480. Alternatively, since the average job class of all white employees in the line of progression is 13.0, the earnings reduction of the additional 5.1 per cent white "freezees" would be greater than $1014. The upper estimate assumes that 5.1 per cent of the hypothetical white freezees experienced reduced earnings of $2151—the projected earnings differential between job class 13.0 (the average job class of whites in the LOP)—and job class 5.9 (the average job class of black freezees). Therefore, 2.8 per cent multiplied by $1014 plus 5.1 per cent multiplied by $2151 yields the upper estimate of $137 (See Table 15).

[b] Missing bids has a negative impact on earnings. Table 17 estimates that for each bid missed 1970 earnings were reduced by

$3.05. The 98 per cent confidence, interval of this estimate was $2.25 to $3.85 (See Table 17). The lower estimate for this factor merely multiplies the black-white differential number of "missed bids" (Table 16) by the *minimum* 98 per cent confidence estimate for the impact of "missing bids" on earnings (i.e., 32.8 multiplied by $2.25 = $69.)

The upper estimate utilizes the estimated impact of spending "additional days in the pool" on earnings. Table 17 estimated that each additional day in the pool resulted in a decrease in 1970 earnings of $0.29. The 98 per cent confidence interval for this estimate is $0.258 to $0.322. Multiplying the *maximum* negative impact of additional days in the pool on earnings—$0.322 by the black-white differential number of days in the pool (1068—See Table 16) yielded the upper estimate of $344.

[c] Additional years of schooling were estimated to have increased the 1970 earnings of Fairfield employees by between $125.2 and $142.8 (98 per cent confidence, see Table 20). Multiplying the minimum estimate by the white-black schooling differential (2.8, Table 19) yields the lower estimate of $351. Multiplying the maximum estimated impact of education on earnings ($142.8), yields the upper estimate of $400.

[d] Whites have 1.02 more years of craft training than blacks (see Table 19). An additional one-half year of craft training was estimated to result in between $220.4 and $255.6 additional earnings in 1970 (see Table 20). Therefore, 1.02 additional years of craft training would be expected to result in between $450 ($220.4 multiplied by 1.02/.5) and $531 ($255.6 multiplied by 1.02/.5) additional dollars of earnings for a Fairfield employee.

[e] Blacks have 2.3 more years of corporate service than whites. An additional year of corporate service is estimated to result in between $45 and $51 of additional earnings in 1970 (see Table 20). Therefore, 2.3 additional years of corporate service should result in between $104 ($45 multiplied by 2.3) and $117 ($51 multiplied by 2.3) additional dollars of earnings.

[f] In terms of equal achievement years of schooling, national data estimate the white-black differential to be between 1.4 and 3.7 (see Table 3). Given the estimated impact of a year of schooling on earnings for Fairfield employees ($134, see Table 20), an achievement differential between 1.4 and 3.7 years of schooling could be expected to result in between $185 ($134 mutliplied by 1.4) and $496 ($134 multiplied by 3.7) lower earnings for those with the lower achievement levels.

DECREE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

United States District Court, Northern District of Alabama
Southern Division

United States of America, Plaintiff;	Civil Action No. 70-906
Luther McKinstry, et al., Plaintiffs;	Civil Action No. 66-343
William Hardy, et al., Plaintiffs;	Civil Action No. 66-423
John S. Ford, et al., Plaintiffs;	Civil Action No. 66-625
Elder Brown, et al., Plaintiffs;	Civil Action No. 67-121
Elex P. Love, et al., Plaintiffs;	Civil Action No. 68-204
Thomas Johnson, et al., Plaintiffs;	Civil Action No. 69-68
James Donald, et al., Plaintiffs;	Civil Action No. 69-165
James Fillingame, Plaintiff,	Civil Action No. 71-131
vs.	
United States Steel Corporation, et al., Defendants.	

Decree

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. General Injunction.—The defendants, the United States Steel Corporation (hereinafter the Company or Management),

the United Steelworkers of America, AFL-CIO-CLC, and Local Unions 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662, and 4203, United Steelworkers of America, AFL-CIO-CLC, (hereinafter the Union) and each of them, their officers, agents, members, employees, successors and all persons in active concert or participation with them be, and hereby are, permanently enjoined and restrained at the Company's Fairfield Works from:

(a) Failing or refusing to hire, promote, upgrade, assign, recall or transfer any individual because of such individual's race or color;

(b) Discharging, demoting, laying-off or otherwise adversely affecting any individual's status as an employee, because of such individual's race or color;

(c) Limiting, segregating or classifying any employee or employees in any manner which would deprive or tend to deprive them of equality in the terms, conditions, privileges, and opportunities of their employment because of their race or color;

(d) Engaging in any acts or practices which have the purpose or effect of discriminating against any individual because of his race or color, or which perpetuate or tend to perpetuate the effects of past practices which discriminated against individuals because of their race or color;

(e) Discriminating or retaliating in any manner against any employee or applicant for employment who has furnished information, testified or participated in any respect in the investigation and prosecution of this action or any other Title VII matter; and

(f) Failing or refusing to fully implement, or to participate and co-operate in the implementation of, the provisions set forth in the body of this Decree.

2. Definitions.—For purpose of this Decree, the following definitions shall apply:

(a) The term "production and maintenance" or "P&M" employees refers to all employees covered, or who previously have been covered, by the Basic Steel P&M Agreements between the Company and the Union, the most current of which is dated August 1, 1971.

(b) The term "trade and craft" refers to those P&M occupations which are so classified under the Basic Steel P&M Agreement.

(c) Except as hereinafter modified by paragraphs 4(f) and 4(g) of this Decree, the term "plants and divisions" (referred to in the singular as "plant") of the Fairfield Works refers to the following facilities.

(1) Ensley Steel Plant

(2) Bessemer Rolling Mill

(3) Fairfield Steel Plant

(4) Coke and Coal Chemicals Division

(5) Fairfield Sheet Mill

(6) Fairfield Tin Mill

(7) Fairfield Wire Mill

(8) Rail Transportation Division

(9) Ore Conditioning Plant

(d) Except as otherwise specified, the term "salaried clerical and technical jobs" refers to those clerical and technical jobs within the bargaining unit represented by Local 2210 of the United Steelworkers of America and the term "excluded clerical and technical jobs" refers to those clerical and technical jobs at the Fairfield Works which are not represented by the Union.

(e) The term "plant protection jobs" refers to those jobs within the Plant Security Department which are within the bargaining unit of Local 2927 of the United Steelworkers of America.

3. Implementation Committee.—Within 10 days after the entry of this Decree, the Company and Union shall each designate an individual to be a member of a three person Implementation Committee. Such Company and Union representatives shall be the individuals having chief responsibility for handling grievances at the Fairfield Works under the Basic Steel Agreements at the Step Four level or, in their unavoidable absence, their respective designees who shall be the available persons who are most familiar with the operation of all collective bargaining agreements in effect at the Fairfield Works and with the terms and conditions of this Decree. The third person on such committee shall be a black employee of the Company who is a member of the Union. Such person shall be appointed by the Court after considering nominations by the various parties hereto, and shall, when performing services on such committee, be compensated at the expense of the Company at a rate comparable to the income which would have been received by him had he remained on his regular assignment.

(a) It shall be the responsibility of the Implementation Committee to insure the dissemination of information and explanations concerning the rights and procedures provided for by this Decree. In carrying out this function, the Committee shall work in co-operation and regular consultation with counsel for the United States in order that there may be agreement between the parties to this action as to the application and implementation of this Decree. In addition, the Committee and counsel for the United States shall seek as far as possible to resolve without resort to the Court any problems which may arise in the effectuation of this Decree. Meetings of the Committee with counsel for the

United States shall be held in Birmingham, Alabama, at the office of the Company's Step Four representative at the request of any member of the Committee or of counsel for the United States upon five days' notice, or at such other place and upon such other notice as the participants may agree to. At such meetings the Committee shall make available to counsel for the United States all records of the Committee, or other information, dealing with the matters handled by or pending before the Committee or which are otherwise the subject of the meeting. Counsel for private plaintiffs shall likewise be consulted, advised and informed as to the matters having unique significance to their clients.

(b) During the two weeks prior to and the three weeks subsequent to the effective date of the substantive provisions of this Decree (the effective date being 90 days after entry) the Committee shall meet regularly at the Fairfield Works Employment Center to advise employees and other interested persons of the rights and procedures provided for by this Decree.

(c) At least 45 days prior to the effective date of the substantive provisions of this Decree, the Company and the Union shall address letters to each employee of the Fairfield Works. The letters shall explain and outline in general terms the provisions of this Decree and procedures established by it. The letters shall also advise of the establishment of the Implementation Committee, the identity and business address of its members, and the dates, times and place at which its members will be available to provide further information and explanations concerning this Decree and its implementation. The text of such letters shall be reviewed by counsel for the United States prior to their issuance. Nothing herein shall prevent the United States, the Company or the Union from sending appropriate information to employees of Fairfield Works at any time.

(d) Subsequent to the effective date of the substantive provisions of this Decree, any employee of the Fairfield Works who feels aggrieved in regard to the application of this Decree shall have the right to make a complaint to his appropriate grievance committeeman or assistant grievance committeeman. Such grievance committeeman or assistant committeeman shall promptly write up such complaint on a customary grievance form and it shall be stamped or marked as one arising under this Decree. A copy of such a grievance shall be made immediately available to the Committee. All actions taken with respect to such grievance shall be promptly reported in writing to the Committee for its review and, if appropriate to effectuate this Decree, its immediate action. Copies of all such grievances and reports, and notifications of any additional action by the Committee, shall be promptly mailed or otherwise delivered to counsel for the United States. Action taken pursuant to the grievance procedure or by the Committee on any grievance shall not bind the United States in any subsequent proceedings brought before this Court to enforce or otherwise effectuate this Decree and the purposes and objectives of Title VII of the Civil Rights Act of 1964.

4. Seniority.—A model set of Seniority Rules and Regulations to be applicable to each of the plants and divisions of the Fairfield Works (other than Train Operations) is hereby established in the form of Appendix "A", attached hereto and made a part of this Decree by reference. Lines of Progression in the form of Appendix "B", attached hereto and made a part hereof by reference, are hereby established. Seniority Rules and Regulations and Lines of Progression for the Plant Security Department are attached hereto as Appendix "C" and made a part hereof by reference. Seniority Rules and Regulations for Train Operations are attached hereto as Appendix "D" and made a part hereof by reference.

These Seniority Rules and Regulations and Lines of Progression may be altered or added to by the parties thereto, provided that any such alteration or addition is consistent with the purposes of this Decree and the principles of seniority established herein, and provided further that copies of any such alteration or addition shall be filed with the Court and served on the United States at least 60 days prior to its proposed adoption.

(a) Occupational seniority in the Ore Conditioning Plant, Fairfield Tin Mill and Fairfield Steel Plant, and line of promotion and departmental seniority at the Ensley Steel Plant, Bessemer Rolling Mill, Coke and Coal Chemical Division, Fairfield Sheet Mill and Rail Transportation Division (except for Train Operations) are eliminated. Except where the Basic Steel P&M Agreement or other agreements entered into between the Company and the Union provide for the use of Company continuous service or some greater measure of continuous service than plant continuous service, plant continuous service shall be used, subject to the provisions of subparagraph (c) hereof and to the limitations contained in the attached Seniority Rules and Regulations, for all purposes in which continuous service is utilized among all production and maintenance employees including promotion, demotion, layoff and recall.

(b) *Reductions and Recalls.*—An opportunity for promotion shall be afforded in the event of a reduction in force (or elimination of an occupation) and the subsequent recall situation in the following circumstances:

(1) On a reduction in force (or elimination of a job) an employee who would otherwise go "to the pool" or "to the street" shall, if he has greater plant continuous service than an employee on an occupation which is immediately above his occupation, be retained in the line and the junior employee be displaced; provided, however, that the promotion to the vacancy created

by such displacement shall be given to that employee of the same occupation having the greatest seniority.

(2) On a recall following a reduction employees shall return to work in order of their relative plant continuous service dates; and an employee may exercise his seniority to step up one job above the highest job he had held on a permanent basis prior to the reduction if he has relative ability and physical fitness to perform the job in question.

(3) Critical jobs, being defined broadly as ones in which a high degree of skill is required on the most responsible jobs in a given operation, are identified on Appendix "B". As an exception to the above provisions, no "bumping up" to a critical job shall be permitted under (1) above except by an employee who has previously been permanently assigned to such job; and on a recall following layoffs the same experienced people shall return to the critical jobs up to the normal level of operations (so indicated on Appendix "B") in the same positions relative to each other that existed prior to the layoff notwithstanding the provisions of (2) above.

(4) There shall be only one promotion per employee under (1) and (2) above in any given reduction-and-recall cycle, and only two such promotions per employee in any twelve month period. These restrictions, and the limitation of a single step-up on recall in (2) above, apply only so long as there are sufficient other employees available for promotion who have previously worked the occupations in question on a permanently assigned basis and are still holding seniority rights in the line of promotion.

(5) No promotional opportunity is afforded under (1) above on a layoff expected to last less than 15

days or under (2) on a recall following a layoff which in fact lasts less than 15 days.

The principles declared in this subparagraph are implemented and detailed in Appendix "A".

(c) Whenever an employee by successful bidding enters a new line of promotion, his continuous service date for promotional purposes in the new line shall, for the period of one year following the date he begins work in such new line on a permanent basis, be the date on which he so begins work in such line. After the expiration of such year his continuous service date for promotional purposes in such line shall be his plant continuous service date, which said date shall even during such first year be his seniority date for purposes of retention or recall to such line. On a reduction in forces or elimination of job during such first year he may utilize his plant continuous service date to remain in the line unless that would require his "bumping up" under subparagraph (b)(1) above; and on a recall during such first year he may utilize his plant continuous service to return to a position to which he was permanently assigned, but not to promote to a higher job in the line using such service date under (b)(2) above.

(d) Temporary vacancies in entry level and other jobs in lines of promotion which are to be filled by employees working in the pool shall be filled by the most senior employee (using plant service) in the pool on the turn in the area in which a temporary vacancy occurs. These areas shall not cover a geographical area larger than a production department, and the service units that operate across a plant or division shall be divided for this purpose to coincide with the geographical boundaries of a producing department, as indicated in Appendix "B".

(e) The Conductors and Switchmen are hereby merged into Local Union Number 3662 which shall represent all

Switchmen, Conductors, Train Operator Helpers and Train Operators. For such affected employees, their continuous service factor shall be their Rail Transportation-Train Operations continuous service date.

(f) The Bessemer Rolling Mill shall be a department (Area 8) within the Fairfield Steel Plant, and the affected P&M employees shall be represented by Local 1013. For such affected employees, their Bessemer Rolling Mill plant continuous service date shall become their Fairfield Steel Plant age in accordance with Appendix "A".

(g) The Maintenance of Way Department of the Rail Transportation Division shall be placed in the Fairfield Steel Plant and the affected P&M employees shall be represented by Local 1013. For such affected employees, their Rail Transportation plant continuous service date shall become their Fairfield Steel Plant age in accordance with Appendix "A".

(h) All seniority units involving a 1A-1B arrangement are hereby eliminated by merger, and those mergers and other mergers to effectuate Title VII are indicated on Appendix "B" by asterisks next to the unit number and by a designation of the unit in which each job was previously located. Mergers effected by the Company and Union prior to this action or prior to the Act, are indicated in Appendix "B" by double asterisks next to the unit number.

5. Transfers to Unionized Salaried Positions.—Within 90 days of the entry of this Decree, the Company shall post notices upon the bulletin boards at each entrance to the plants to the effect that each production and maintenance employee who is not presently permanently assigned to a "salaried clerical or technical job" or to the Plant Security Department shall have the opportunity, during the next 120 days following such post-

ing, to signify his desire to transfer to "salaried clerical and technical jobs" or to the Plant Security Department. Any production and maintenance employee seeking a transfer pursuant to this paragraph must indicate, on a form to be provided by the Company, within said 120 days after said posting, the lines of promotion containing salaried clerical and technical jobs or within the Plant Security Department to which he wishes to transfer. When a permanent vacancy occurs (created by death, quit, discharge, retirement, or transfer out of the unit) in the "salaried clerical and technical" or Plant Security units which is not filled by an employee with rights in those units, employees who have signified such desire to transfer, in such manner as provided herein, shall be considered by the Company. If ability and physical fitness are relatively equal, such employee with the greatest continuous service in his respective plant shall be offered the assignment. The employee selected to fill such vacancy shall have as his continuous service date in the new unit for seniority purposes the plant continuous service date which he held in the plant from which he transferred, provided, however, that for promotional purposes during the first year following the date he enters such new unit his service date shall be the date on which he so begins work in such unit.

6. Training Opportunities.—The Company shall provide all employees with such appropriate training and learning opportunities as are necessary to enable them to take full advantage of the promotional and other advancement opportunities provided for by this Decree.

(a) The Company shall provide to those black employees at Fairfield Works with Works seniority dates prior to January 1, 1963, who have worked 24 months or more in any of the "helper" of "helper type" jobs identified in Appendix "E" to this Decree, an opportunity to demonstrate whether they are qualified to promote into the trade or craft occupation associated with such jobs as indicated on the Appendix. Those who demonstrate the ability to perform as journeyman shall be eligible to bid on vacancies in the appropriate trade or craft in the same manner as provided for craftsmen and apprentice graduates by Appendix "A". Those who demonstrate that they possess the basic knowledge of the trade or craft but are not able presently to perform as journeyman shall be provided with the opportunity (subject to reasonable limitations to be established by the Implementation Committee, bearing in mind the number of employees so eligible and the foreseeable requirements for the trade or craft at the Works) to perfect their trade or craft skills through on-the-job experience and training or accelerated apprentice training and, upon successful completion thereof (if, or as soon thereafter as, they have 48 months of experience on the "helper" or "helper type" job and such training program), shall be eligible to bid on vacancies in the appropriate trade or craft in the same manner as provided for craftsmen and apprentice graduates by Appendix "A".

(b) The Company shall make available additional opportunities for training in, and advancement to, the position of Car Repairman Welder and report its plan therefor to the Court within thirty days after the entry of this Decree.

7. Affirmative Action.—The Company's "Affirmative Action Compliance Program," which was effective May 1, 1972, provides goals for employment of approximately 28% black employees in defined categories of employment at Fairfield Works in which under-utilization of minorities has been found to exist. On the present record, the Court finds such goals to be in reasonable compliance with the purposes of the Act; and said goals are hereby incorporated into this Decree and made binding upon the Company, provided that the goals referred to below shall be made applicable to the occupations and positions set forth in the following subparagraphs and shall be implemented, to the extent

there are qualified black applicants or candidates available, as indicated therein.

(a) *Future Vacancies in the Apprentice Program:* The Company shall, to the extent there are qualified black applicants available who are incumbent P&M employees, select at least one black applicant for every white applicant selected to fill future permanent vacancies in the Apprentice Program until such time as approximately 25% of the employees in Trade and Craft positions are black.

(b) *Future Vacancies in Salaried C&T Jobs:* Provided there are no employees who pursuant to paragraph 5 qualify and desire to fill permanent vacancies in entry level salaried clerical and technical occupations within the work jurisdiction of Local 2210, and provided further that such vacancies are not filled pursuant to the Local C&T Seniority Rules and Regulations presently in effect, the Company shall, to the extent there are qualified black applicants available, assign one black applicant for every white applicant assigned to fill all future permanent vacancies in entry level clerical and technical occupations until such time as approximately 20% of the employees in salaried clerical and technical positions are black.

(c) *Future Vacancies in Excluded C&T Jobs.* The Company shall, to the extent there are qualified black applicants available, assign one black applicant for every white applicant assigned to fill all future permanent vacancies in those excluded clerical and technical occupations which have customarily been treated as entry level occupations until such time as approximately 20% of the employees in excluded clerical and technical positions are black.

(d) *Future Selection of Management Trainees:* To the extent there are qualified black candidates available from the ranks of P&M employees, the Company shall, beginning with the 1973 management trainees, if any, select

one black candidate for every two white candidates selected from the ranks of P&M employees for entry into the Management Training Program at Fairfield Works until such time as approximately 20% of the employees in supervisory positions at the general foreman level or below are black.

(e) *Future Direct Appointment to Supervisory Positions:* To the extent there are qualified black candidates available, the Company shall appoint one black for every two white employees appointed directly to supervisory positions at the general foreman level and below from the ranks of P&M employees until such time as approximately 20% of the employees in supervisory positions at the general foreman level and below are black.

(f) The Company shall not fail to meet the above requirement for selection or appointment of black applicants on the ground that such applicants are not qualified if they possess qualifications equal to or exceeding those which were possessed by a white applicant for the same or like position who in the past was selected or appointed and who has performed successfully in such position. In addition, the Company shall provide an appropriate pre-apprentice or pre-journeyman course of instruction for those applicants referred to in subparagraphs 6(a) and 7(a) above designed to enhance the ability of an applicant to qualify for the Apprentice Program or for obtaining craftsman status.

8. Earnings Retention.—Any black employee at Fairfield Works with a Works seniority date prior to January 1, 1963, shall, in the event during the three years following the effective date of this Decree he, upon or after entering a new line of promotion, obtains such line as his home seniority unit, be provided with the following earnings protection:—

(a) Following such change in home seniority unit there shall be added to the compensation paid such employee in

any pay period the product obtained by multiplying the hours worked by him during such pay period times the amount, if any, by which his prior hourly rate exceeds his actual hourly rate for such pay period. "Hourly rate" for this purpose shall be computed by dividing the base and incentive earnings (but not shift, overtime or holiday premiums) for a pay period by the number of hours worked during such period; and "prior hourly rate" shall mean the average of the hourly rates of such employee, so computed, for the six pay periods immediately preceding his entering the new line of promotion. Future general increases in the standard hourly rate shall not diminish the amount of a differential except to the extent of that portion of a general increase which is designated in a Basic Steel Agreement as an "increase in increment" between job classes (i.e., increases in the amount of money separating one job class from the next).

(b) If the transferring employee's "prior hourly rate," computed under the above paragraph, would exceed the "prior hourly rate," similarly computed, of every employee in the line of promotion to which he is transferring, no additive in compensation under subparagraph (a) shall be provided.

(c) The additive in compensation under subparagraph (a) shall terminate and cease upon the earliest of the following:

(1) Fifty-two weeks after the transfer.

(2) After six consecutive pay periods in which the employee works but is not entitled to any additive.

(3) Upon voluntarily thereafter transferring into or entering some other line of promotion, seniority unit or pool job. (For emphasis, an employee having rights under subparagraph (a) who is involuntarily rolled

back into the pool from his new line or unit will not for that reason lose any entitlement to the additive.)

(4) Upon refusing, or failing to take an opportunity for, a permanent promotion to a higher job in his line of promotion or seniority unit unless less than 30 days have elapsed since entry into such line or unit or since his last preceding permanent promotion in such line or unit.

(5) Upon twice failing to qualify for a permanent position in an available higher job in the new line or unit, provided, however, that two or more failures to qualify within one thirty day period shall count as only one failure.

9. Reports.—In accordance with the schedules set forth below, the Company shall file the following reports with the Court and serve copies upon all parties:

(a) Prior to March 1, 1976, a report shall be filed setting forth for all P&M, C&T and Plant Security employees:

(1) A current seniority roster for each line of promotion, seniority unit, and area pool within each plant which reflects for each employee thereon: (A) his name, badge number and race; (B) his plant continuous service date established under this Decree; (C)(i) the title, job class and line of promotion or area pool of the job (using the designations appearing in Appendix "B") on which he worked most frequently during the last completed payroll period prior to August 1, 1973, and (ii) on the basis of the last 26 completed payroll periods prior to August 1, 1973, his total hours worked and his average hourly rate for (1) base, (2) base plus incentive, and (3) total occupation earnings during those periods; and (D) (i) the title, job class and line of promotion or area pool of the job on which

he worked most frequently during the last completed payroll period prior to February 1, 1976, and (ii) on the basis of the last 13 completed payroll periods prior to February 1, 1976, his total hours worked and his average hourly rate for (1) base, (2) base plus incentive, and (3) total occupation earnings (in 1973 constant dollars) during those periods.

(b) One year after the entry of this Decree, and annually thereafter, a report shall be filed setting forth the following information:

(1) For each vacancy in an entry level or other job within a line of promotion (other than apprentice vacancies) which is posted in accordance with the procedures in Appendix "A"; (A) the title of the job and the plant and line of promotion involved; (B) the closing date for bidding; (C) a list of all bidders, in order of their plant continuous service dates and indicating for each: (i) his name, badge number, race, and home plant; (ii) his plant continuous service date; and (iii) whether or not his bid was successful. In any instance where a black P&M employee has a plant continuous service date which would have entitled his bid to be successful but he is nevertheless not awarded the vacancy, the reason or reasons for his non-selection shall be set forth in detail. If a Trade and Craft vacancy is not filled, the reason for not doing so shall be stated.

(2) A list of all members of the affected class who have been given the opportunity to qualify pursuant to paragraph 6(a) as journeymen with an indication for each of: (A) his name and badge number; (B) the trade or craft to which his "helper" or "helper type" job was related; (C) his original home plant and his plant continuous service date therein; (D) the date he

was provided an opportunity to qualify and whether or not he qualified; and (E) if assigned to a journeyman occupation, the date, plant and unit of the assignment.

(3) A list of all members of the affected class who have entered an on-the-job or other training program pursuant to paragraph 6(a), with an indication for each of: (A) his name and badge number, (B) the trade or craft and the type of training program involved; (C) his original home plant and his plant continuous service date therein; (D) his current status in the program; and (E) his present plant, unit, job assignment and continuous service date as an apprentice if he is an apprentice. If an employee is dropped from a training program provided for by paragraph 6(a), the reason for such dropping shall be indicated.

(4) A list of all apprentice vacancies which are posted for bids pursuant to Appendix "A" with an indication for each of: (A) the trade and craft involved; (B) a list of all persons bidding on or otherwise considered for each vacancy and for each such person: (i) his name, badge number, race and home plant; (ii) his plant continuous service date; (iii) whether or not he was selected; and (iv) if most senior and not selected, the reason why.

(5) A list of all persons newly hired into clerical and technical positions with an indication for each of: (A) his name, badge number and race; (B) the unit, title and job class of the job involved and whether it is an "included" or "excluded" position; (C) his date of hire; and (D) his employment status as of the close of the reported period.

(6) A list of all persons enrolled in the Company's management trainee program with an indication for

each of: (A) his name and race; (B) the date of his enrollment; (C) whether he was recruited from the ranks of wage employees, from college, or from some other source; (D) his employment status and the plant, department and position to which he was assigned as of the close of the reported period.

(7) A list of all P&M employees who have been directly appointed to supervisory positions from the ranks of P&M employees during the reported period with an indication for each of: (A) his name, badge number, race and plant continuous service dates as a wage employee; (B) the date of his appointment; (C) the plant, department and supervisory position to which he was appointed and the plant, unit and job from which he was appointed; and (D) his employment status as to the close of the reported period.

(8) A list of all supervisory personnel at the General Foreman or comparable level and below with an indication for each of: (A) his name and race; (B) date of appointment as a supervisor; and (C) his employment status and place, department and position to which assigned as of the close of the reported period.

(9) A list of all reductions in force of 14 days and, separately, of 15 or more days, with an indication for each of: (A) the plant and unit involved; (B) the nature and extent (e.g., 15 to 10 turns, specific jobs if less than all, etc.) of the reduction; (C) the duration of the reduction; and (D) if the reduction is of 15 or more days, for each employee who promotes pursuant to paragraph 4(b)(2), (i) his name, badge number, race and plant continuous service date and (ii) the job to which promoted and the highest job previously held on a permanent basis.

(10) A list of all members of the affected class transferring with "red circle" earnings protection pursuant to paragraph 8 with an indication for each of: (A) his name, badge number and home plant; (B) the unit or pool area from which he transferred and the unit to which he transferred; (C) the date of his transfer; (D) his "red circle" rate; and, (E) the current earnings rate of the job he is working during the last completed and closed payroll period prior to the date of the report.

(c) Within sixty (60) days of the entry of this Decree, the Implementation Committee shall: (1) compile by jobs listed in Appendix "E" the names, badge number, address, telephone number, plant and plant continuous service date of those members of the affected class referred to in paragraph 6(a); (2) prepare a plan for the implementation of paragraph 6(a) which shall indicate the period during which the opportunities to qualify for journeyman status shall be offered, the tests or other criteria to be used for determining qualifications, and the nature and length of the on-the-job training or experience opportunities to be offered; and (3) for the Pre-Journeyman and Pre-Apprentice training opportunities provided for by paragraph 7(f), indicate their nature, duration and manner in which they will be offered.

10. Records.—The Company shall maintain all personnel and payroll records necessary to compile the reports called for by this Decree and shall also maintain all manning schedules setting out temporary and permanent assignments in all lines of promotion where such schedules in the past have been prepared. Such records shall be made available for inspection and copying by the United States or, to the extent pertinent, by private plaintiff, during regular business hours and upon reasonable notice. The court retains jurisdiction for a period of

five years from the effective date of this Decree for the purpose of resolving any disputes that may arise under this paragraph.

11. Class Actions.—The Court concludes that the following actions are due to be maintained as class actions for the classes indicated, finding that in each the prerequisites of Federal Rule 23(a) are satisfied and that in addition the provisions of Federal Rule 23(b)(2) are applicable:

(a) McKinstry et al. v. U.S. Steel Corp., et al., CA 66-343: the class being all black persons who have at any time prior to January 1, 1973, been employed in the Plate Mill department of the Fairfield Steel Plant.

(b) Hardy et al. v. U.S. Steel Corp., et al., CA 66-423: the class being all black persons who have at any time prior to January 1, 1973, been employed in the Blast Furnace department of the Ensley Steel Plant.

(c) Ford et al. v. U.S. Steel Corp., et al., CA 66-625: the class being all black persons who have at any time prior to January 1, 1973, been employed in the former Pratt City Car Shop line of promotion; and, for the purposes of this Decree, the plaintiffs herein represent a class consisting of all black persons who have at any time prior to January 1, 1973, been employed at the Fairfield Works (except to the extent they may be otherwise included as a class member under subparagraphs (a) through (f)). This latter class shall also include all black persons who have unsuccessfully sought employment at Fairfield Works prior to January 1, 1973.

(d) Brown et al. v. U.S. Steel Corp., et al., CA 67-121: the class being all black persons who have at any time prior to January 1, 1973, been employed in the Maintenance of Way department of the Rail Transportation and Material Handling Division of Fairfield Works.

(e) Love et al. v. U.S. Steel Corp., et al., CA 68-204: the class being all black persons who have at any time prior to January 1, 1973, been employed as Millwright Helpers at the Ensley Steel Plant.

(f) Donald et al. v. U.S. Steel Corp., et al., CA 69-165: the class being all black persons who have at any time prior to January 1, 1973, been employed as Machine Shop Hookers in the Shops and Construction Department of the Fairfield Steel Plant.

Although the classes are defined broadly and inclusively, as above indicated, these actions, and this Decree, relate only to claims of discrimination which are systematic in nature; claims, if any, of class members of individual discrimination at variance with and contrary to the regular policies and practices are not affected by these actions or the decree herein.

12. Notice.—A copy of this Decree and the relevant attachments shall be maintained at the Superintendent's office in each plant and division. In addition, a copy of this Decree and its attachments shall be made available at the Fairfield Works Employment Center to any employee, to any black former employee and to any unsuccessful black applicant for employment prior to January 1, 1973, who within six months after the date of this Decree requests a copy. The Implementation Committee shall take reasonable steps to inform such persons of the entry of this Decree and of their rights to a copy thereof.

13. Back Pay.—An award of back pay to class members in Civil Actions 66-343 (PM Fin. Hookers only), 66-423 and 66-625 shall be paid to those class members who have been damaged by the discriminatory lines of promotion therein involved. Jurisdiction is retained by the court to determine such back pay on further hearings and proceedings. The Company and Local 1013 shall each be assessed one-half of the award in CA 66-343; the Company and Local 1489 shall each be

assessed one-half of the award in CA 66-423; and the Company and Local 1733 shall each be assessed one-half of the award in CA 66-625. Back pay relief in all other cases is denied.

14. Attorney's Fees and Costs.—An award of attorney's fees and costs in favor of the plaintiffs is made in CA 66-343, CA 66-423, CA 66-625, CA 67-121, CA 68-204 and CA 69-165, the Company and the affected Local to each bear one-half of such awards, respectively. An award of costs in favor of the plaintiff in 70-906 is made, such amount to be paid in its entirety by the Company. Case CA 69-68 was moot when instituted and accordingly is hereby dismissed, each party to bear its own costs. Case CA 71-131 was in essence a case charging unfair representation by the union, which was not sustained by the evidence, but the relief sought therein was to a limited extent granted by this Decree under the other actions; and accordingly each party shall bear its own costs in such case. The Court retains jurisdiction to determine the amount of the awards of attorney's fees in the cases indicated.

15. Effective Date.—Paragraphs 4, 6, 7 and 8 of this Decree shall be implemented and become effective August 1, 1973; such paragraphs may be utilized on direction of the Implementation Committee during this ninety day period, and, to the extent not so utilized, all permanent vacancies in any production and maintenance job at Fairfield Works during this ninety day period shall be filled on a temporary basis utilizing the current rules for filling permanent vacancies. This is a final order and judgment; provided, however, that inasmuch as certain matters have been reserved for further proceedings, this shall not constitute an appealable judgment (except in CA 69-68 and CA 71-131, which have been fully disposed of) until all remaining such issues have been determined or until the Court hereafter enters an order under Rule 54(b). Challenges in CA 70-906 to testing procedures are hereby severed and shall be separately

tried at a time to be set by the Court subsequent to the resolution of all other issues referred to above.

16. Retained Jurisdiction.—The Court will retain jurisdiction not only until disposition of those matters on which further proceedings are needed under this order, but also thereafter for the purpose of issuing any additional orders or decrees needed to effectuate Title VII of the Civil Rights Act of 1964 or to enforce or clarify the implementation of this Decree. Where an application or motion for an order of enforcement or clarification indicates by signature of counsel that it is unopposed by the Company, the Union and the United States, the application or motion may be presented to the Court without hearing and the proposed order may be immediately implemented.

Done this the 2nd day of May, 1973.

SAM C. POINTER, JR.
United States District Judge

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

United States of America,
Plaintiff,
Luther McKinstry, et al., Plaintiffs;
William Hardy, et al., Plaintiffs;
John S. Ford, et al., Plaintiffs;
Elder Brown, et al., Plaintiffs;
Elex P. Love, et al., Plaintiffs;
Thomas Johnson, et al., Plaintiffs;
James Donald, et al., Plaintiffs;
James Fillingame, Plaintiff;

v.

United States Steel Corporation et al.,
Defendants.*

Civ. A. Nos. 70-906, 66-343, 66-423, 66-625, 67-121, 68-204, 69-68, 69-165 and 71-131.
United States District Court,
N. D. Alabama, S. D.

Dec. 11, 1973.

Memorandum of Opinion

Pointer, District Judge.

Consolidated trial of these Title VII cases[1] began in June,

* Consolidated with: McKinstry v. United States Steel Corp., 66-343; Hardy, 66-423; Ford, 66-625; Brown, 67-121; Love, 68-204; Johnson, 69-68; Donald, 69-165; Fillingame, 71-131.

[1] The Fillingame suit, CA 71-131, brought by a white employee, is essentially a charge of unfair representation against the union. The other private suits, brought by black employees, make claims under 42 U.S.C.A. § 1981 as well as under Title VII.

1972. In December, 1972—after hundreds of witnesses, more than 10,000 pages of testimony, and over ten feet of stipulations and exhibits (the bulk being in computer or summary form)—the parties rested, subject to the submission of certain supplemental computer studies and analysis. Trial would have been even more prolonged but for the severance of one major issue (test validation) and for the very professional attitude of all counsel in expediting trial.[2] A decree of over 150 pages was entered May 2, 1973, covering most issues; and on August 10, 1973, a final judgment was entered covering all remaining issues except that of test validation. This preface is given to explain why the court in this opinion has chosen not to deal with each aspect and issue but rather to focus on matters related to the few questions as to which appeal has been taken.[3]

Overview of Operations and Organization

"Fairfield Works," one of the largest units of United States Steel Corporation, consists of nine plants in Jefferson County, Alabama. Two (Ore Conditioning; Coke & Coal Chemicals) process raw materials. Two (Ensley; Fairfield) are basic steel producing facilities, with some finished products. Four (Tin; Wire; Sheet; Bessemer Rolling) make finished products. The ninth[4] (Rail Transportation) provides rail transportation services for the other eight.

[2] For example, on one day the court was able to hear over 60 witnesses relative to a narrow dispute of fact. Rarely was the court called upon to rule on matters of authenticity of documents.

[3] The court has been advised that the appeals are limited to back pay and earnings retention ("red circle") issues. While this opinion is filed subsequent to entry of judgment the essential findings and conclusions were communicated to the parties prior to the judgment in a series of informal conferences.

[4] The term "plant" is a misnomer for Rail Transportation but is nevertheless used in this opinion for convenience.

The plants came into being at different times, and some were initially under different ownerships. Ensley, the oldest part of the works, was started in 1886, while Ore Conditioning, the most recent, was constructed in 1939-40. The nine plants now form a single interrelated steel producing operation, with operational responsibility vested in a General Superintendent. His principal managerial assistants, called Division Superintendents, have functional responsibilities which may include operations at more than one plant.

Similarly, union organization—and subsequent management recognition—occurred at different plants at varying times during the late 30's and early 40's. Two locals of the Steelworkers represent production and maintenance (P & M) employees of the Rail Transportation plant; a separate Steelworkers local represents P & M employees at each of the other eight plants. A separate Steelworkers local represents plant protection employees throughout the works, and another represents the unionized clerical and technical (C & T) employees works-wide.[5]

In recent years the basic principles for employment of P & M employees have been established in triennial industry-wide negotiations leading to, *e. g.*, the 1965 Basic Steel P & M Agreement. These principles have, however, since 1953 been modified on a local basis through the adoption of "local seniority rules and regulations," in which the various locals have asserted their independence in collective bargaining. The consequence is that, though the basic principles are similar, there are ten separate arrangements governing seniority for P & M employees at Fairfield Works, as well as a separate arrangement for plant protection workers and one for the unionized C & T employees. It should be noted that employees holding trade and craft (T & C)

[5] The United Steelworkers of America, AFL-CIO-CLC, and the twelve Steelworkers locals constitute, along with the company, the defendants in this litigation. Three other unions, not named as defendants, have represented a limited number of employees in specialized operations.

positions in a plant are part of the same local which represents non-T & C employees at that plant and are subject to the same collective bargaining agreement, though with some special provisions for T & C jobs.

In the steel industry in general, and at Fairfield Works in particular, there are significant fluctuations in operational requirements and, hence, in manpower levels. Some jobs may be worked on a three-shift-a-day, seven-day-a-week basis ("21-turns"), and then at other times worked one-shift-a-day, five-days-a-week by a single man or crew ("5-turns"), or even completely halted, with a variety of intermediate manning levels. Within a given plant one operation may be on a 21-turn basis and another, during the same period, on a 5-turn basis. This fluctuation constitutes a major factor in the study of the "system" at the works and, in turn, is dealt with at length in the collective bargaining rules.

On a relatively busy day one would expect to find some 12,000 persons on the job[6] at Fairfield Works, of which some 27% would be black employees.[7] P & M employees constitute the bulk of the work force—typically some 3,100 blacks and 6,000 whites—and, accordingly, it is not surprising that this litigation has tended to focus principally on employment practices and conditions concerning P & M employees.

There are over a thousand P & M positions, most of which are filled by more than one employee on a given day. These positions

[6] There would be several thousand additional employees either sick, on vacation or leave, or on lay-off.

[7] The record of the company in hiring blacks over the years is sufficiently good that in none of the suits is there a general claim of discrimination in hiring. There is a claim of discrimination as to hiring for certain types of jobs (*e. g.*, supervisory) and as to initial assignment of blacks disproportionately to less desirable plants. On this latter claim the court finds from the evidence no such discrimination since July 1965; and on the first claim the court has included in the decree provisions to mandate judicially parts of the company's "Affirmative Action Compliance Program."

have a technical name generaly descriptive of their principal function, e. g., "Rail Straightener Helper," and frequently have a shop name, e. g., "Gagger". Each position has a prescribed job class level, e. g., "JC 4", which determines the relative wage scale for that job in comparison with other jobs.[8] Most, but not all, positions have production-oriented incentive pay arrangements, either direct or indirect, some by individual performance and others by crew or group productivity. The differences between these negotiated incentive plans may be quite significant: for example, a JC 2 position with a "good" incentive plan may be more attractive financially than one rated JC 6 with a "poor" plan. Of course, the earnings of any individual P & M employee are also dependent upon how many hours are worked and when (*e. g.*, overtime, shift premiums, and Sunday and holiday premiums).

Seniority System

Within each plant the higher paying jobs—virtually all in JC 5 or above, and some in JC 4—are grouped for promotional and retention purposes in ladder-like sequences called lines of pro-

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[8] The job class levels, which range from a low of JC 1 to a high of JC 30, were established in the late 40's and early 50's as an outgrowth of a wage inequity study program initiated under the auspices of the War Production Board and conducted on an industry-wide basis. The levels were established after a consideration of a number of factors inherent in the jobs as performed at the time of the study, *e.g.*, physical effort, mental effort, skills, responsibility, working conditions, et cetera. The industry—companies and unions—has agreed not to reevaluate these ratings except where the factors have changed since the time of the study. At triennial bargaining sessions the actual hourly rate for each job class level is determined by negotiation: *e. g.*, under the 1971 agreement the hourly rates start with $3.385 for JC 1 and rise to $5.905 for JC 30. While agreeing not to reevaluate JC determinations for particular jobs absent a change in the job content, the parties have occasionally negotiated "differentials" for "out-of-line" or special situations (*e. g.*, trade and craft).

gression or promotion (LOP).[9] The groupings generally, but not always, are composed of occupations which work together on some process (e. g., feeding and operating a rolling machine) or which perform similar functions (e. g., maintaining production or inventory records). For the most part the upward sequence is from the lowest JC occupation in the line to the highest; but, here again, there are numerous instances in which a higher job in the LOP may, whether by reason of its JC level, incentive plan, or otherwise, be a lower paying job in practice than one or more of those below it.

When a vacancy arises in a job in an LOP, those persons on the immediately preceding rung of the ladder are entitled to first consideration. If one of these persons is selected, this may create a vacancy on that step of the ladder, which in turn is filled by promotion of a person on the next preceding rung, etc. If this process ultimately produces a vacancy on the bottom step of the ladder, it is filled by bringing a new employee into the LOP.

The selection of which of several employees on the same step of the LOP is to be promoted is essentially[10] a question of which is the "oldest" employee. At this point a generalization as to works-wide practice can no longer be made; for under some local

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[9] Composition of the several hundred LOPs in Fairfield Works varies widely. Many have but one job (which eliminates the promotional aspect of the LOP concept). Some are long lines, with the bottom job(s) being JC 4 and, after many intervening occupations, a top job as high as JC 30. Some LOPs have a top job below JC 10; others have their bottom job above JC 10. Some have multi-manned jobs, a number of employees working the same job at the same time; others have but one employee filling each level of the ladder. Most LOPs are ladder-like; but some have one or more branches, which may or may not reunite. Some treat several jobs as being on the same level or even as the same step of the ladder; others treat each job as a new step even if there is no change in earnings.

[10] Under the contracts age is the determining factor only where ability to perform the work and relative fitness of the competing employees are relatively equal. In practice most vacancies are filled in accordance with the age factor.

plant rules the oldest employee is the one who has been on the preceding job longest (occupational seniority), while in others it is the employee with longest service in the LOP (LOP seniority), in the department (departmental seniority), or in the plant (plant seniority).

In most plants the method for determining age for promotional purposes is also used to determine age for the purpose of job entitlement on reductions and increases in manpower levels. The younger or junior employee so determined, is, in a work reduction, "rolled back" to the next lower job or jobs in the LOP until his age is sufficient to allow him to "hold", thereby displacing at that point a junior employee who then in like manner rolls back into lower jobs or into the pool. The process is, in essence, reversed on an increase in manpower levels. There are various special rules, not identical for all plants nor necessarily uniform within the same place, to cover particular situations; such as where a younger employee is for some reason holding a higher job in the LOP, or where an employee prefers "going to the street" and taking supplemental unemployment benefits (SUB), or where an LOP contains lower jobs that, due to prior mergers of lines or otherwise, the employee has not previously worked. There are special rules covering temporary assignments and delineating between those vacancies considered permanent and those deemed temporary.

The lower rated jobs, except in the Ore Conditioning Plant, are grouped into pools, which generally correspond to geographical divisions or departments in the plant.[11] These offer no promotional opportunities as such;[12] rather they are essentially

[11] The basic concept of the pools, which were established in 1962-63, is not challenged by the United States or the private plaintiffs. The pools provide better protection against layoff than existed prior to their creation, utilizing plant age to determine entitlement to a pool job. In a sense the pool jobs represent a bottom job for all lines of promotion.

[12] There is a limited form of promotional opportunity within a pool. The Company and local union have classified the jobs in each area pool according to their relative desirability (from the standpoint of earnings, exertion and working conditions). The employees on pool jobs having the longest service in the area which the pool covers are entitled to a job with Job Desirability Level 1 (most desirable), those with the next longest such service to JDL 2 jobs, and those with the least such service to JDL 3 jobs. The selection of which job in the applicable JDL an employee is assigned has been left to management's discretion.

"waiting" jobs—more menial jobs to which employees are assigned while they wait to get into, or return to, an LOP job. Assignment of pool employees to temporary vacancies in LOPs is left to the discretion of management, the evidence indicating that the principles employed in making such assignments vary from one supervisor to the next.

Permanent vacancies in an LOP which are not filled by employees already in that LOP[13] are filled by a bidding system specified in the collective bargaining agreements: the vacancy is "posted"; interested employees, whether in the pool or from other LOPs, can bid on the vacancy; the company is then required, assuming relatively equal abilities and fitness, to select that bidding employee with the most plant service where the job is located. A grievance and arbitration procedure is spelled out in the contracts; and the evidence demonstrates that the unions have, in promotional disputes as well as in other matters, fairly pursued such remedies for the employees without regard to their race or color.[14]

[13] Those with recall rights to the LOP are first offered the position before it is bid. It may be noted that, while most frequently it is the bottom job in the LOP that is posted, on occasions (for example, when employees lower in the line decline the promotion or when there is a large upturn in the level of operations) some intermediate job or jobs in an LOP may also be filled by the bid procedure.

[14] This is particularly significant in matters such as promotional disputes because the union will generally find itself urging a position that, at the same time, is adverse to the best immediate financial interest of another of its members. In making this finding and conclusion, the court is not expressing agreement with the result of each grievance about which some evidence was presented at trial, nor is the court saying that in each such dispute was any racial

A significant degree of choice is reserved to the individual employee. He[15] may decline to bid from the pool or another LOP on a posted vacancy in an LOP to which, based on plant age, he presumably would be entitled. He may decline to take a permanent promotion from a job in an LOP to a higher job in that line. He is usually allowed to decline to accept a temporary assignment, whether that be a step-up in his own LOP or an opportunity given a pool employee to work on an LOP job. He may, after having declined such opportunities or assignments in one or more occasions, change his mind when the situation is next again presented.

Each LOP is, in essence, separate from all other LOPs, without transfer rights except through the bid procedure,[16] which generally means starting at the bottom of the ladder and, under the occupational and LOP age systems, as a "new" man. In practical effect this means that an employee's promotional history, at least in retrospect, is to a significant degree preordained by the LOP which, through the voluntary bid system, he successfully chooses to enter. At the time of making his choice of LOPs he can do little more than guess as to his future.[17] An

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discrimination corrected. Rather, the court is saying that in the handling of grievances there has been no racial discrimination as a systemic matter, allowing for the possibility of some isolated aberrations.

[15] The masculine gender is used throughout this opinion for convenience. It should be noted however that the company has a number of female employees, including many in P & M jobs. This litigation does not involve any charges of sex discrimination, nor does the court imply that there is any evidence of such discrimination. However, in framing its decree, the court has attempted to avoid any provisions that would result in such discrimination or tend to perpetuate the effects of past discrimination, if any, based on sex.

[16] As an exception, the company and union in the Sheet plant have provided a link between units 123A and 125A.

[17] For example, in 1968 Oscar Beaton was the successful bidder in two separate LOPs. His choice (contrary to his foreman's advice) has resulted in a $1,200 loss (comparing his earnings to those of the employee who advanced to the other job on his declination) in a three year period, and quite likely will result in further losses in the years ahead.

LOP which at the time appears to be most promising may, due to differences in the health or circumstances of other employees, in technological advances, in the demand and competitive situation for particular products, et cetera, provide in fact fewer opportunities than LOPs which he chose to turn down. Even within an LOP he may find himself confronted with a similar dilemma when the line divides into separate branches. The point of the foregoing is not to condemn as such the seniority system, but rather to emphasize that *choice* and *chance* play a vital role in the system—and are, indeed themselves major elements of the system which this court is called upon to evaluate under the provisions of Title VII and 42 U.S.C. § 1981.

Perspective

In this litigation the court is looking not at a still photograph, but rather at a motion picture, one which pans across nine plants in Jefferson County, Alabama, and occasionally picks up activities in Pittsburgh or on a college campus. It commences many years before passage of the 1964 Civil Rights Act. Nor has it ended with the institution of these suits; indeed, it continued to run during the five months of trial such that a frame of July 1972 had undergone changes when compared with one in December of that year. In like manner, the court is asked to fashion remedies by estimating what this motion picture can depict in the months and years ahead.

With over 10,000 employees, the number of interactions between employees and of possibilities for employment disputes becomes, over a period of years, rather astronomical. Given the racial composition of the work force, it is not surprising that a

very large number of disputes would be considered by one or more of the participants as having racial implications. Indeed, it is understandable that black employees, having experienced various forms of direct and indirect racial discrimination in other areas of life, would frequently perceive any disappointments in employment matters from a like perspective. To accept this as so does not mean, of course, that their perceptions are either always correct or never correct.

The court's attention in this litigation[18] is directed however not to individual complaints as such, but to charges of discriminatory procedures, policies, and continuing practices. The focus is upon a system, not upon the isolated aberrations therefrom as such. The system, of course, involves not merely a study of rules and procedures, whether express or implied, but also a consideration of how these work in application. There is evidence, for example, that George Davis, a black millwright, may have the wrong seniority date. The applicable rule has been that his "age" is to be computed from the time he became a millwright helper, and he says that he became a helper earlier than the date shown for him on the seniority lists. While not called upon to determine the merits of each such complaint, the court can, however, conclude from the evidence concerning Davis and others that (1) one of the attributes of the system is that it is not perfect —the possibility of error is indeed a part of the system; (2) the system provides mechanisms for the correction of errors (*e. g.*, the grievance procedure and collective bargaining); and (3) the corrective mechanisms are themselves imperfect.

The focus of this litigation is whether this imperfect system, with its imperfect correcting mechanisms, meets the standards imposed by law and, to the extent it does not, how such

[18] Of course, an action can be brought respecting a single, isolated act of discrimination under 42 U.S.C.A. § 2000e-2. But each of the private plaintiff cases here involved has a broader scope. It is doubtful that the court could have physically managed the litigation if each possible claim of individual discrimination had been pressed through the vehicle of these cases.

should be corrected. So, we are concerned about the "age" of George Davis not to correct an error in his seniority date, but rather to evaluate the system and its elements. If the number of like incidents is sufficiently high, we may take this to be characteristic of the system and, if it tends to affect blacks to a greater degree than whites, we are called upon to view the system in this respect as racially discriminatory and provide rectification.

Seniority questions in a real sense are not matters of the company or the union "doing something" to somebody else, but rather disputes between two employees or groups of employees in which a major objective of company and union is to survive unscathed. Yet the perspective of the plaintiffs (as well as white employees) frequently is that "they"—meaning the company or union or both—did something or failed to do something. But the plaintiffs and the other employees are in many respects part of the "they", whether as employees of a corporation which can only act through its agents, or as members of a union which likewise is ultimately dependent upon the actions of its members.[19]

It is easy enough to hold that policies established by the work's General Superintendent are those "of the company." At lower echelons the answer is more difficult. For example, the racial prejudice of a turn foreman translated into action by the unfair assignments of temporary work, or of some skilled white workman in refusing to give training to a black employee, is discrimination. But when such actions are contrary to established policy of the company, a policy which upper management attempts to enforce within means reasonably available, these should not, it seems, be taken as company action,[20] that is, insofar as representing any policy or procedure of the company.

[19] In this connection it is not without significance that the unions at the Wire plant and Bessemer Rolling Plant are dominated by black members.

[20] A distinction can be drawn between an unintended or accidental act and an intended act which, though without bad motives, pro-

When is a procedure racially discriminatory? Only when the impact falls solely on black employees? Only when the beneficiaries of the practice are solely white employees? If affirmative answers were to be given, very few, if any, of the plaintiffs' claims could be sustained. This court concludes, to the contrary, that a practice or procedure which has mixed racial effects may nevertheless be presumptively violative of Title VII where the benefits or detriments therefrom bear a significant correlation to race. It should be noted that efforts to correct such situations can likewise be expected to produce benefits and detriments which do not completely follow racial lines.

Finally, this court must continue to remind itself that the principles governing this industrial community were not divined in the sanctuary of a theoretician's office, but rather to a large extent were evolved through trial and error over a long span of time by people having to live with the consequences.[21] So then, the court should be wary of adopting a cavalier attitude toward unnecessary alterations in the basic fiber and structure of this community, while at the same time keeping in mind that the "business necessity" doctrine means just what the words denote and that these long-standing rules "do not, *per se*, carry the authoritative imprimatur and moral force of sacred scripture, or even of mundane legislation." United States v. Jacksonville Terminal Co., 451 F.2d 418, 454 (CA5 1971).

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duces a proscribed result. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and Rowe v. GM Corp., 457 F.2d 348 (CA5 1972). This is not, of course, to rule that an individual claim under Title VII cannot be predicated on an action by a foreman in the scope of his employment.

[21] Note also that the older practices, developed when there was direct segregation of most P & M jobs, were not themselves racially motivated—they rather were dealing with relative seniority between employees of the same race.

Discrimination

The foundation for this litigation rests upon the undisputed fact that at Fairfield Works a policy of segregation was generally followed until the past decade. Most LOPs were segregated, with the black-only and few racially-mixed lines containing, not surprisingly, most of the less desirable jobs and none of the highest paying ones. There were few black employees in T&C positions, and none in clerical and technical jobs, plant protection occupations, or managerial and supervisory positions.

In the early 60's, however, largely in response to Executive Order 10925 and Whitfield v. United Steelworkers, 263 F.2d 546 (CA5 1959), non-discrimination became the announced official policy at the works. By 1963, the company and unions had established the system, previously described, for pooling the lowest paying jobs and for open bidding into the LOPs. They also had begun a program for merging LOPs, a program under which, ultimately, a majority of the formerly all-black and racially-mixed lines were mered into formerly all-white ones.[22]

The formal opening of the door did not, of course, constitute an immediate panacea for all blacks whose employment opportunities had been so long restricted. A number of contributing factors can be identified as explanation of why the change in announced policy was somewhat less than what it was advertised, and perhaps expected, to accomplish: the actual loss of seniority on changing LOPs . . . the fact that entry-level LOP jobs sometimes involve a reduction in overall-earnings . . . the belief, due in large part to confusion over the rules, that there were other

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[22] Mergers were generally accomplished by tacking formerly black or mixed jobs to the bottom of existing white lines. This, however, was understandable because such jobs, as noted, were typically the lower-paying less-skilled ones. It is in the placing of intermediate jobs, in the establishment of 1A-1B (see *infra*) lines, and in the failure or delay in merging lines that active (as distinguished from passive perpetuating) discrimination can be seen.

disadvantages to bidding into a new line . . . the rejection of some black bidders through application of the ability and fitness standards . . . the skepticism and suspicion by many blacks as to the reality of new opportunities . . . the disapproval and resistance expressed by many white employees to such changes . . . the unwillingness, particularly among older black employees, to leave familiar conditions, to assume greater responsibilities, or to be considered troublemakers . . . the inability, again particularly among the older employees, to learn new skills . . . etc. Furthermore, enjoyment of these new opportunities was directly dependent upon vacancies coming open; and the overall manpower levels at Fairfield Works have generally been on the decline during the past decade.

The point is that, while the 1962-63 changes represented a truly radical alteration in the employment practices at Fairfield,[23] some passage of time was needed for these processes to begin transforming the statistical profile, at least as viewed by an outside observer.

It is clear that on July 2, 1965, the effective date of Title VII, the basic principles of the seniority system in effect at Fairfield were not "actively" discriminatory.[24] It is likewise clear that in many respects this system, in violation of Title VII, has perpetuated the effects of the pre-1963 discrimination. Local 189 v. United States, 416 F.2d 980 (CA5 1969).

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[23] These changes pre-dated most of the dramatic changes in education, housing, public accommodations, etc. Responsible leaders for the company and unions were, according to the evidence, subjected to threatening and abusive communications, vilification generally in the community, and hanging in effigy. Ten years later, when the battle-cry has changed such that it typically begins, "We're not fighting integration, but . . .," there is a tendency to block out the memory of what was said and done in the early 60's.

[24] Plaintiffs do not really seek to posit a cause of action under 42 U.S.C.A. § 1981 on pre-1963 acts in view of the statute of limitations question. See Buckner v. Goodyear Tire, 339 F.Supp. 1108 (N.D.Ala. 1972), aff'd, 476 F.2d 1287 (CA5 1973).

The sequential arrangement of jobs in a line of promotion has a tendency, by its very nature, to prolong the effects of a prior restriction of blacks to lower jobs, as does the judicial impediment to "bumping" incumbents. However, when supplemented by a standard that uses occupational or LOP age to measure promotions or retention priority, the secondary position of blacks becomes fixed—initially behind, they will remain behind their white contemporaries in progressing up the ladder towards better jobs. Use of LOP age produces similar results where, as here, the past discrimination involved segregated lines; and even departmental age has like consequences where, as here, black employees were not assigned, in the past, proportionately among all departments.

Injunctive Relief

The principal remedial step directed by the court to alleviate this situation has been to mandate the use of plant age in measuring seniority for promotion,[25] retention, and recall purposes.[26] Also, the court directed forty-one additional mergers of LOPs, primarily to increase promotional opportunities. In a large number of LOPs other changes were directed, as by transferring one or more occupations from one line to another,

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[25] For promotional purposes there is a year's waiting period before plant age may be used by a new entrant into an LOP. This is to insure a minimum period for training and experience before rising to more responsible positions in the line. As shown by the evidence, a failure to require such a period not only would create a significant hazard to personnel and equipment, but also would have substantial adverse effect under the production-oriented incentive plans on the compensation of other employees, including members of the plaintiff class. By other provisions of the decree the pre-1963 black employees choosing to enter a new LOP are, however, granted earnings protection in their new line during this waiting period.

[26] Use of plant age, or even company age, would not necessarily be an appropriate remedy if the company had been guilty in the past of racial discrimination in hiring. There is no evidence in this case of any such discrimination regarding P & M jobs.

or by altering the relative position of some jobs (to correct the typical placement of formerly black jobs below comparable white jobs), or by "boxing", "blocking", or connecting jobs in a line in such a way as to provide the equivalent of job skipping where not contrary to business necessity shown by the evidence.[27] The 1A-1B concept was ordered abolished.[28]

To increase the number of occasions in which these new rights may be exercised in conformity with the principles enunciated in Local 189 v. United States, *supra*, the court has directed that opportunities for promotion be afforded not only in the event of the death, retirement or promotion of other employees, but also with appropriate safeguards[29] in recall situations following force reductions of at least fifteen days. For like reason, the court has, in view of the very limited promotional opportunities potentially available in the Bessemer Rolling Mill and in the Maintenance of Way Department of the Rail Transportation Division, directed that such LOPs be realigned as departments in the Fairfield Steel plant, with a carry-forward of their former

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[27] The court does find and conclude from the evidence that business necessity has been shown and established for the basic principle involved in the line of promotion concept and that, in the particulars where not so shown, the same could be corrected without discarding the principle itself.

[28] Many "mergers" of lines were effected by tacking a formerly black line near the bottom of a white LOP, but as a separate root or branch. The top jobs in such a 1B branch were to have, on paper if not always in practice, a priority to entry-level vacancies in the 1A branch, though without any credit for time spent in 1B jobs. In many of these situations this concept was coupled with the incorporation of "Rule VII-A-1-a", which, at least on paper, gave whites up in the 1A line the right to roll back into 1B jobs on reductions in force.

[29] A few jobs—those in which a high degree of skill is required on the most responsible jobs in a given operation—have been designated as "critical" jobs and excluded from those in which periodic reshuffles may occur as a consequence of increases and decreases in the work force. This protection, deemed essential if reshuffling is to be allowed on other jobs, is limited to the manning levels during normal operational levels.

plant age for use in bidding on jobs in other LOPs in their new plant.

Temporary assignments of pool employees to LOP jobs are significant both in terms of increased interim earnings and in view of the training afforded thereby. To assure fair treatment, the court has directed the company to utilize plant age in determining the pool employee to fill a temporary vacancy in an LOP in the area served by that pool.

Across-the-board, uniform, color-blind modifications in the seniority rules, such as summarized in the three preceding paragraphs, do not in every particular erase the continuing effect of past discrimination. Accordingly, special remedies—as by requiring training and testing for certain craftsman occupations and by judicially mandating portions of the "Affirmative Action Compliance Program" promulgated by the company—have been incorporated in the court's decree to rectify the impact of past discrimination in T & C positions, C & T occupations, and supervisory jobs. A significant feature of these provisions is that, while the company is not required to appoint an unqualified person to such positions, yet it may not reject as unqualified a black applicant who possesses qualifications equal to those which were possessed by any white applicant for the same or like position who in the past was selected and who has performed successfully in such position.

To minimize unnecessary confusion and turmoil and to assure accurate dissemination and understanding of the court's decree of May 2, 1973, two complementary provisions were included in the order. First, a ninety-day delay was provided for most of the substantive changes in the seniority system.[30] Secondly,

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[30] The dissemination process was accomplished more rapidly and with fewer problems than had been anticipated; and, accordingly, many of the changes were, by agreement of the parties and with the court's approval, put into effect prior to the August 1, 1973, deadline.

and equally important, the court established an on-the-site three-member Implementation Committee, consisting of a knowledgeable representative of the company, of the unions, and of plaintiff class. In addition to acting as a communications link, the Implementation Committee is available to monitor the grievance procedures for possible deviation from the principles established by the court decree and has assisted in the preparation of plans for upgrading to journeyman status certain black employees in conformity with the court's decree.

Back Pay and Future Pay

Back pay is properly viewed as an *integral* part of the whole of relief, which seeks not to punish the defendant,[31] but to compensate the victim of discrimination. United States v. Georgia Power Co., 474 F.2d 906 (CA5 1973). Cf. Moody v. Albemarle Paper Co., 474 F.2d 134 (CA4 1973) (in view of strong congressional policy successful plaintiffs should ordinarily be awarded back pay unless special circumstances would render the award unjust).

This policy, however, is one that guides the court in its exercise of equitable discretion.[32] Monetary awards must nevertheless be made only for actual damage. Lea v. Cone Mills Corp., 438 F.2d 86 (CA4 1971); Moody v. Albemarle Paper Co., 474 F.2d 134 (CA4 1973). While equity may for purposes of injunctive relief presume damages from the invasion of a

[31] But see United States v. N. L. Industries, 479 F.2d 354 (CA8 1973) in which the court indicated that the deterrent effect of back-pay awards, spurring other employers and unions to initiate corrective measures, is more important than the compensatory role. This comment sounds much like punitive damages.

[32] Concluding that the award of back pay in these cases is but a part of an equitable procedure, the court has denied any right to a jury trial. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (CA5 1969); Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (CA5 1973).

legal right, United States v. Hayes Intern'l Corp., 415 F.2d 1038 (CA5 1969),[33] traditionally the courts have required, as a prerequisite to compensatory monetary awards, both proof that the claimant has actually sustained a loss from the defendant's improper conduct and evidence from which the amount of such damage can be determined with a reasonable degree of accuracy. See United States v. Huff, 175 F.2d 678 (CA5 1949); Blake v. Robertson, 94 U.S. 728, 24 L.Ed. 245 (1877); Philp v. Nock, 17 Wall. 460, 84 U.S. 460, 21 L.Ed. 679 (1873). The question becomes what evidence is sufficient for these purposes and, of necessity, what party has the burden of proof with respect thereto.

"Statistics often tell much, and Courts listen." Bing v. Roadway Express, Inc., 444 F.2d 687 (CA5 1971). An argument can be made on the basis of the opinions in Cooper v. Allen, 467 F.2d 836 (CA5 1972) and Hodgson v. First Federal Savings & Loan Ass'n, 455 F.2d 818 (CA5 1972), that evidence, such as statistical data, which would suffice to shift the burden of proof[34] to the defendant respecting the alleged discrimination by the employer, would likewise shift such burden to the defendant respecting the claim for back pay. In *Cooper* and *Hodgson*, however, both of which involved claims of discrimination by applicants who were refused employment, the real controversy was not whether the plaintiffs had been injured, but whether such injury was the result of discrimination.

The array of statistical evidence presented in this case by the plaintiffs strongly indicates that the effects of past racial discrimination have been perpetuated by the employment

[33] Also see 42 Am.Jur.2d Injunctions § 29.

[34] The distinction between the burden of going forward with the evidence and the burden of persuasion, each sometimes meant under the label "burden of proof", is frequently blurred, even in cases which specifically deal with the issue. See, *e. g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

practices at Fairfield Works, and the court has placed great weight upon such evidence both in finding statutory violations and in tailoring injunctive relief to remedy the same. But proof that these practices have discriminated *on the whole* against black employees—or, stated another way, discriminated against the "average" black employee—is not evidence that William Hardy,[35] for example, has been damaged by a violation of Title VII. Nor, at least in the absence of evidence supporting punitive action for wilful misconduct, does the class action device transform individual claims into a "fluid" claim for the class as a whole. Cf. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (CA2 1973), cert. granted 414 U.S. 908, 94 S.Ct. 235, 38 L.Ed.2d 146 (1973).

The applicable rule has been stated by the Fifth Circuit as follows:

> But, back wages are not to be automatically granted whenever a person is ordered reinstated. The wages sought must be "properly owing to the plaintiffs." This requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed. Jinks v. Mays, 464 F.2d 1223, 1226 (CA5 1972).

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[35] Hardy, lead plaintiff in the first private action filed, is a significant example for the reason that he was a member of a group, blacks in the Blast Furnace Department of the Ensley Steel plant, with respect to which the evidence was sufficient to show injury from discriminatory practices on which individual damage claims were susceptible of fair approximation. Yet, when the lengthy "flow charts" were prepared showing the impact which the court decree would have made had such provisions been instituted by the parties back in July 1965, it turned out that Hardy himself had not been damaged by the old system, but indeed had greater earnings under it than the new system would have produced. The back pay awards were limited, of course, to those who had been injured, and accordingly Hardy himself got no benefits from the back pay award in favor of members of the class which he represented.

This principle was, by quoting the foregoing with apparent approval, held applicable to Title VII cases in United States v. Georgia Power Co., 474 F.2d 906, 922 (CA5 1973), the court noting that a finding of racially disproportionate earnings due to employment practices is not by itself a proper premise for the making of a back pay award. Thus, in Bing v. Roadway Express, Inc.,[36] 485 F.2d 441 (CA5 1973), where one employee was found to be entitled under the evidence to back pay, other claimants were not: "The other four are not entitled to back pay because . . . even if Roadway had not been discriminatory, they could not have obtained road jobs earlier than they did. Therefore they suffered no financial loss from Roadway's discrimination." At 452. In a case such as the one *sub judice*, where employee initiative and choice are critical factors in the job selection process, it seems clear that the burden of proof must, consistent with traditional rules of jurisprudence, be placed on the claimant to establish his injury and damages.

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[36] On the surface *Bing II*, by using qualification dates rather than application dates, may appear inconsistent with this decision. Insofar as seniority is concerned, footnote 12 of the *Bing II* opinion notes that "qualification date" is essentially only a variation on the theme of company seniority, which, under the particular circumstances of the case *sub judice*, is the equivalent of the plant seniority mandated by the court. This court's consideration of the significance of the bidding system upon the back pay claims is, however, somewhat at variance with the reasoning of the Fifth Circuit regarding Bing's back pay claim. The variance is thought to be justified by factual differences in the two cases. Here, the bidding system was recognized by the parties prior to July 1965 as giving, in the context of *Bing II*, transfer rights; in *Bing II* the "application" process was in July 1965 not a recognized right, but indeed contrary to the established no-transfer policy. Here, some three years of experience with the open bidding system had elapsed so that by July 1965 blacks knew—or should have known—that they could enter the formerly all-white LOPs; in *Bing II* the court recognized that in July 1965 blacks, with the exception of a few who had the courage to "fight the system", did not bother to apply because they knew full well that blacks were not going to be hired as road drivers. Here, there are scores of possible jobs of varying attractiveness to a given employee; in *Bing II* the issue related to a single higher-paying, higher-status job, obviating any real question of interest.

In three situations this burden was carried; that is, the evidence showed that a particular group of black employees, or some of them, had been injured by an unlawful employment practice and, at least with supplementation of the original evidence, it would be possible to fix with a reasonable degree of accuracy, though not with exactitude and certainty, the approximate amount of their respective individual damages. The groups, and the causative employment practice involved, were: employees in the former Pratt City Car Shop LOP, where a needed merger of segregated lines was inexcusably rescinded until December 1971 (the *Ford* class); employees in the Blast Furnace Department of the Ensley Steel plant hampered by discriminatory lines of promotion ("1A-1B" configurations) (the *Hardy* class); and PM Finishing Hookers in Fairfield Steel's Plate Mill Department, whose promotional opportunities were frustrated by placement of the Finishing Craneman jobs up in a separate line of promotion (the *McKinstry* class).

The basic approach to fixing the damage claims in these situations was to assume that the changes made in the affected LOPs by the court decree had been made on July 2, 1965, along with the changes in measurement of "age" (*i. e.*, by using plant age) and in defining when vacancies arose (*i. e.*, on force cut-backs of 15 days or more). The employees in the lines were assumed to possess equal fitness and skill and to be equally interested in accepting vacancies higher in the LOP.[37] Then a history was prepared since July 1965, showing deaths, retirements, transfers, increases and decreases in work forces, etc., and vacancy events thereby determined. Employees were then slotted into the vacancies using plant age and the assumptions indicated, producing in essence a flow chart of hypothetical personnel changes. Earnings in a hypothetical assignment were determined during a particular time segment by looking at the earnings in fact of the employee who actually had occupied that job, the number of hours actually worked during that same time by the assumed occupant at the job and multiplying those hours worked times the hourly rate of the hypothetical assignment. Then the employee's hypothetical earnings were compared to his actual earnings over the same period. Those shown to have sustained a loss by such study were then given an award of back pay equal to 150%[38] of the difference in earnings. Sixty-one employees received back-pay awards, most being several thousand dollars though with a spread from a low of $74.62 to a high of $9,851.90. The employment practices causing these damages were joint products of company and local union action, and, utilizing 42 U.S.C.A. § 2000e-2(c)(3), the court assessed one-half of each award against the responsible local union,[39] and the other half against the company.

Each flow chart involved assumptions as to a single LOP and the employees already in such LOP. Even so, many hours were required to make the necessary calculations. Other approaches suggested by plaintiffs were rejected by the court as inconsistent with the requirement to determine on an individual basis the actual loss caused by the unlawful employment practice.[40]

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[37] A variation was made in the *Ford* case due to the significant number of declinations of promotion by both white and black employees. One study was prepared assuming no declinations had the new system been in effect; a second study was prepared assuming the same declinations under the new system as took place under the old system. The results of the two studies were then averaged.

[38] A 50% increment to the ascertained back-pay loss was added, essentially as a prospective-pay equivalent, because the affected employees, even under the decree, will require some additional time to reach their "rightful place." The best estimate of this was, on the average, some 3-4 years, which represents about one-half of the period involved in the study, hence the 50% increment.

[39] The international union was not really responsible for the practices giving rise to the three back-pay awards. It should, moreover, be noted that the international has taken a strong role of leadership, not always without disagreement from the locals, in pushing nondiscriminatory policies.

[40] Plaintiffs' suggestion that damages be ascertained by comparing average white employee earnings in the LOP during the period

One might argue that, albeit with the expenditure of thousands of man-hours, comparable studies could be made to estimate damage caused by the hindrance to the bidding system resulting from use of occupational or LOP age. The court could, for example, be asked to hypothesize that entry into LOPs had been filled since July 1965, purely on the basis of departmental age without regard to the bidding system. But, apart from personal preferences, not all vacancies offer the same actual or apparent opportunities. The most senior employee would be slotted to the first vacancy, perhaps one with lower earnings than his pool job, and, indeed, due to lack of subsequent vacancies in upper jobs in the LOP, it might end up as the final spot for that employee. A younger employee under this hypothesized movement could experience the fortuitous circumstance of getting into a line which subsequently had a number of vacancies or increased work requirements, and move rapidly up to higher paying jobs. Perhaps the court would be asked to assume that the more senior employees, after entering an LOP, would have moved to another LOP having a subsequent vacancy. Or perhaps the court would be asked to reconstruct a progression using complete hindsight, i. e., look back now at all vacancies and operational levels in LOPs over the eight years, determine in retrospect which turned out to be "the best", and hypothetically assign the employees in order of department, plant or company age—such an approach would, of course, produce a fundamentally false methodology for measuring loss caused by any unlawful employment practice.

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with the earnings of blacks is fundamentally inconsistent with the "rightful place" approach—the court should determine the loss caused by the unlawful employment practice, as distinguished from that which is the result of pre-Act discrimination independent of perpetuating policies. The suggestions regarding lump-sum payments, whether or not accompanied by distinctions based on age or years of employment, while easier in administration and probably more understandable to the affected employees, would result in some employees being paid more than their loss and others less, thus actually creating inequity among recipients of back pay.

The ultimate conclusion, simply, is that in the particular context of this case the assessment of back pay for the pre-1963 discrimination systematically perpetuated by the effect of inhibiting seniority standards upon the bidding procedures would be fraught with speculation and guess-work.[41] What were problems in assessing back pay in the three situations in which the same was awarded are unsurmounted obstacles to the across-the-board claims for back pay generally. This conclusion is reached whether under the label of failure of proof,[42] Jinks v. Mays, 464 F.2d 1223, 1226 (CA5 1972), or under the label of equitably determining the true balance of interests, United States v. Georgia Power Co., 474 F.2d 906, 922 (CA5 1973).[43] As stated in *Georgia Power*,

> The trial court's decision must also include a weighing of issues as to limitations and laches . . ., factors of economic reality (*i.e.*, the relative expense of accurate determination of individual rights vis-a-vis the amounts involved) and,

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[41] While the analysis has dealt with the problems of entering lines of promotion, similar difficulties arise regarding promotion within many LOPs, particularly where there are branches in an LOP or where a job in an LOP actually has higher earnings than some job(s) above it in the line. It should be reiterated that this litigation is concerned with systemic discrimination; it has not determined, or attempted to determine, each claim of individual discrimination, such as the assertion of some black employee who may assert that the rejection of his bid on a job was racially motivated.

[42] In this case it is not so much that the evidence is insufficient, as that the evidence adduced demonstrates that assessment of damages cannot be made consistent with applicable principles of law.

[43] It should be noted that the court has considered the question of back pay both from the perspective of class action claims in the private suits and as part of the relief appropriately sought in the Attorney General's suit. In indicating to the parties in January 1973, its conclusion that the Attorney General was not precluded from seeking back pay for the victims of discrimination, the court, as it turned out, correctly predicted the decision of the Fifth Circuit in *Georgia Power*.

> most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief. This listing is intended to be illustrative and not exhaustive. It is our intention to leave the issue altogether open for reconsideration and decision by the court below. 474 F.2d at 922.

If, as indicated, an accurate determination—or even a reasonably accurate estimate—of individual rights is to be a cornerstone for back pay awards, then, with the exception of the three specific situations noted, this cannot be done in the present case, and most certainly not within the physical and fiscal limitations of the court.

While it is clear that a claim for back pay cannot be defended on the lack of evil intent or even on a showing of good will, Rowe v. GM Corporation, 457 F.2d 348 (CA5 1972) (remanding for reconsideration of, *inter alia*, back pay notwithstanding strong evidence of good will), this is not to say that such matters are completely unworthy of any consideration, at least in equitably attempting to strike a true balance of interests. *See, e. g.*, LeBlanc v. Southern Bell Telephone & Telegraph Co., 333 F.Supp. 602 (E.D.La.1971), aff'd, 460 F.2d 1228 (CA5 1972); Jinks v. Mays, 464 F.2d 1223 (CA5 1972); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (CA9 1972).

Here, the company—particularly at upper management levels—and the unions—particularly at the international level, and their representatives—have been in the forefront of expanding employment opportunities for blacks. There is no need to recount the evidence which establishes the many initiative steps taken by them to eliminate racial discrimination, albeit still falling short by today's standards. They have modified the employment practices at Fairfield periodically to comply with all legal requirements as from time to time they with reason understood them to be. The Steelworkers union was, in fact, active in obtaining support for passage of Title VII. They had good reason to believe that the seniority system at Fairfield, lauded

in Whitfield v. United Steelworkers, 263 F.2d 546 (CA5 1959), also was consistent with Title VII, at least in this circuit.[44] Though not a defense, reasonable good faith efforts at compliance merit some consideration, in equity, particularly where a purpose of back pay awards is to encourage non-judicial solutions.

It should perhaps also be noted, though obvious, that in this case the parties being asked to provide damages have not received any monetary benefit from the conduct being proscribed. The recipients of the compensation which should have been paid to the victims of discrimination here are not the company and the unions, but rather fellow employees. As immediate displacement of incumbent fellow-workers through "bumping" is considered inappropriate, so also is any consideration of assessing damages directly against those who have benefited from the wrongful practice. The point is—though this, of course,

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[44] In Local 189 v. United States, 416 F.2d 980 (CA5 1969), the first appellate decision requiring a revision of a seniority system such as at Fairfield Works, the court saw no necessary conflict with the decision of the district court in United States v. H. K. Porter, 296 F.Supp. 40 (N.D.Ala.1968), which had upheld such a system in the steel industry. The District Court in United States v. Bethlehem Steel Corp. (Lackawana plant), 312 F.Supp. 977 (W.D.N.Y. 1970), concluded that remedies such as required in *Local 189* were inappropriate in the steel industry. A similar conclusion was reached by a Hearing Panel in the Matter of Bethlehem Steel Corp. (Sparrows Point Plant), OFCC Dkt. 102-68, issued December 18, 1970. Not until June 1971, was the *Bethlehem Steel* (Lackawanna) decision reversed by the Second Circuit, 446 F.2d 652. Even so, the *H. K. Porter* decision was then on appeal to the Fifth Circuit and, particularly in view of its treatment in the *Local 189* opinion, the strong possibility of a confiict in circuit decisions remained. An effort was made on behalf of the parties in the case *sub judice* to obtain information, at least tentatively, as to the Fifth Circuit's decision in *H. K. Porter* for guidance at Fairfield Works, but the decision has not yet been rendered. In forming the decision for Fairfield Works, no effort has been made to analyze factual differences from *H. K. Porter*. Rather, the court has, on the basis of the evidence produced in this case, concluded that violations of Title VII have occurred and formed remedial measures considered appropriate thereto.

is true in virtually all employment discrimination cases—that there is no factor of unjust enrichment for consideration by the court in weighing the equities.[45]

Another factor for consideration in weighing the equities on an award of back pay is the extent of other relief being granted. In this case, concluding for the reasons already mentioned that back-pay should not be awarded to the rank-and-file black employee, though also recognizing that, while not susceptible of sufficient proof, black employees generally have suffered over a number of years from prior discrimination, the court, quite frankly, has made its injunctive relief somewhat broader than what might strictly be required to correct the statutory violations.[46] The award which cannot be made for pre-Act discrimination and which under the evidence should not be made for post-Act perpetuating policies is in part taking the form of broader injunctive relief for the whole class of black employees, including those who have not suffered the prior discrimination. In this sense the victims of past discrimination are responsible for a better legacy to the younger members of their race.

One further item bears mention; namely, the provision for a form of prospective pay. As part of the injunctive relief

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[45] Of course, some of the beneficiaries of the unlawful practices were black employees, just as some of those hindered by such practices were white employees. One may well question the equity of an award which required payment of back wages to those blacks underpaid (assuming the evidence were sufficient for such purpose) without giving any credit for over-payments to other blacks which were necessary results of the same act or procedure. Likewise, where a system is being reformed because of its effect on blacks generally, rather than from any actual desire to discriminate against blacks, one may question the equity of an award which failed to compensate those white employees who might be shown to have suffered loss from the very same system.

[46] This is not to suggest that the remedial provisions establish any Utopia for black employees, any more than the prior rules were so viewed by whites. Experience indicates that as new rights are obtained, other less annoying problems invariably are perceived as increasingly troublesome.

those pre-1963[47] employees who elect to take advantage of their new rights by entering new lines of promotion are provided earnings-protection, or "red-circling", in their new line. This is intended to make more meaningful those rights and applies, subject to appropriate limitations, during that first year after entering a new line in which they cannot use their plant age for promotional purposes. As distinguished from the formula used in the Bethlehem Steel Lackawanna settlement, the red-circle rate includes not only protection of the job class rate, but also the incentive earnings.

Attorneys Fees

The same policy that commends the award of back-pay is reflected in the statutory authorization to award attorney's fees to the prevailing parties. The special circumstances which prevented the court from awarding back-pay except in three situations are not, however, problems in the award of attorney's fees. Each of the cases brought by black employees, except for one relating to allegedly segregated facilities—which had been corrected prior to suit—can properly be viewed as ones in which the plaintiffs prevailed. After consideration of the evidence presented in connection with application for fees, the court awarded fees in each of such cases (except the facility case, which had been abandoned) based on the traditional factors and on the policy of fairly supporting these "private Attorneys General" suits. The total awarded was $205,000.00, and was divided between the company and the particular local union involved in the case. It should be noted that but for the major

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[47] Only those employees who had service prior to the open bidding system should have been deterred from bidding by virtue of the inequitable seniority standards to be used in the line of promotion. As the conversion to the bidding procedure actually took place over a period of time, no one point clearly stands as "the" cut-off point. The court chose January 1, 1963, as, on balance, a fair place for demarcation.

role carried by the United States in its pattern and practice suit, the time and, in turn, the award of attorney's fees would no doubt have been even more substantial.

Decision

The findings of fact and conclusions of law contained in this memorandum were the basis for the court's decree of May 2, 1973, and its judgment of August 10, 1973.

NOTICE OF APPEAL BY JOHN S. FORD

In the United States District Court
for the Northern District of Alabama
Southern Division

John S. Ford, et al., Plaintiffs,		
vs.		66-625.
United States Steel Corporation, et al., Defendants.		

Notice of Appeal

Please Take Notice that the above-named plaintiff John S. Ford, on behalf of that class consisting of all black persons who have at anytime prior to January 1, 1973 been employed at the Fairfield Works of United States Steel Corporation, hereby appeals to the United States Court of Appeals for the Fifth Circuit the final order of the United States District Court for the Northern District of Alabama entered in the above action on August 10, 1973, insofar as said order denies backpay; excepting however from this appeal those classes of persons encompassed in the cases of *McKinstry et al. v. United States Steel Corp., et al.* (No. 66-343), *Hardy, et al. v. United States Steel Corp., et al.* (No. 66-423), *Brown, et al. v. United States Steel Corp.*, (No. 67-121), *Love, et al. v. United States Steel Corp., et al.* (No. 68-204), *Donald, et al. v United States Steel Corp., et al.* (No. 69-165), and that class of persons included in *Ford, et al. v. United States Steel Corp., et al.* consisting of all black persons

who have at any time prior to January 1, 1973 been employed in the former Pratt City Car Shop line of promotion.

/s/ OSCAR W. ADAMS, JR.
OSCAR W. ADAMS, JR.

/s/ JAMES K. BAKER
JAMES K. BAKER

/s/ U. W. CLEMON
U. W. CLEMON
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Attorneys for Plaintiffs

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States of America,
Plaintiff-Appellant,

v.

United States Steel Corporation, et al.,
Defendants-Appellees.

John S. Ford, et al., Plaintiffs-Appellants,
Clifford Craig and L. G. Phillips, Movants-Appellants,

v.

United States Steel Corporation, et al.,
Defendants-Appellees.

No. 73-3907.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1975.

Appeals from the United States District Court for the Northern District of Alabama.

Before Thornberry, Morgan and Clark, Circuit Judges.

Thornberry, Circuit Judge:

These appeals arise from a sharply-contested employment discrimination case which involves over 3,000 black steelworkers. The proceedings below culminated in a decree, entered May 2, 1973, in which District Judge Pointer ordered major changes

in the seniority structures at the nine plants of defendant United States Steel Corporation's Fairfield Works, Birmingham, Alabama. Of main interest for present purposes, Judge Pointer found that the Fairfield seniority systems (occupational, line of progression, and departmental)—products of collective bargaining between the company, the United Steelworkers of America, AFL-CIO, and various locals—operated to lock blacks into lower-paying and less-desirable jobs, and thus perpetuated the effects of the company's pre-Title VII active racial discrimination in hiring and initial assignments. The district court ordered implementation of a broad scheme of plant service seniority, rate retention ("red circling"), racial quotas for hiring and promotion, and other remedies designed to eradicate continuing impediments to blacks' reaching their "rightful places." Those measures are not before us for review, as the defendants did not appeal from the court's findings or the decree.

A number of complaints were consolidated below for trial. Out of six certified private class actions brought pursuant to 42 U.S.C. § 2000e-5 and 42 U.S.C. § 1981, involving 464 black employees, the district court awarded back pay to sixty-one members of three classes (the *Hardy*, *McKinstry*, and "original" *Ford* classes). No appeals were taken with respect to those three classes. The government also litigated a "pattern or practice" suit, 42 U.S.C. § 2000e-6, and sought back pay for the approximately 2,700 remaining blacks in the Fairfield production and maintenance workforce. This prayer was denied, and is the subject of the present appeal.

The government, however, has withdrawn its appeal in favor of the nationwide steel industry settlement, to which United States Steel and the Union are parties. *See United States v. Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826. In this court the representative appellant for the rank and file black workers on whose behalf the government unsuccessfully sought back pay below is John S. Ford, who, throughout the

trial, represented only thirty-five blacks in the Fairfield Car Shop of the Rail Transportation Division (the "original" *Ford* class). The substitution was accomplished by Judge Pointer in the May 2 decree, wherein he summarily enlarged the "original" *Ford* class so as to include in a F.R.Civ.P. 23(b)(2) class action judgment all blacks employed at Fairfield prior to January 1, 1973 who were not otherwise represented in a private class action. Thus, the district court designated in practical and legal effect a "new" *Ford* class.

The now-unchallenged facts which supplied the bases for findings of liability on the part of the company and the unions, and hence the works-wide injunctive relief, are reported with the opinion of the district court, *United States v. United States Steel Corp.*, N.D.Ala.1973, 371 F.Supp. 1045, 1049-57. The "new" *Ford* class appeal involves issues concerning the manageability of the class action and whether back pay is available to putative class members. There is in addition an appeal by a group of former black and white ore miners from the denial of their application for permissive intervention pursuant to F.R.Civ.P. 24(b). That is denominated the *Craig* appeal. Following careful consideration of the district court's opinion, the briefs and oral arguments of the parties, together with the parties' Joint Appendix, we are of the opinion that the district court must be charged with an abuse of discretion in the denial of back pay to every member of the new *Ford* class. This is largely due to a recent series of binding case law developments in this circuit and in the Supreme Court. These cases were decided subsequent to December 11, 1973, the date of the district court's opinion, and therefore Judge Pointer did not have the benefit of them. Furthermore, subsequent to the May 2, 1973 enlargement of the "original" *Ford* class—or, if one prefers, substitution of the "new" *Ford* class—this court sitting *en banc* issued guidelines addressed to the handling of Rule 23(b)(2) employment discrimination class actions in the trial courts. Whether the substance of these guidelines was observed below is not apparent from the record.

On remand, a variety of additional determinations must be made before this case will be capable of assured resolution. We therefore vacate the denial of back pay to the group on whose behalf the government sought back pay below (the "new" *Ford* class), and remand for further proceedings consistent with this opinion and other controlling authority. On remand the district court should carefully redetermine the propriety of the amorphous "new" *Ford* class in light of the consequences of binding such a group to a final judgment. Also, specific findings should be made with regard to the availability of back pay and certain of the defendants' special defenses. Finally, it is necessary that the district court reexamine its legal approach in the context of the foregoing tasks. The existing analysis is no longer acceptable—if ever it was—to justify a generalized conclusion that back pay should not be awarded to victims of employment discrimination. To the extent that the trial court may conclude that additional back pay is now warranted, it should proceed to Stage II of the bifurcated class action procedure, discussed *infra*. At that point it should invite the parties' proposals for computation and distribution, and select a reasonable method for making the affected class whole, while avoiding—as far as possible—the "quagmire of hypothetical judgments."

We are of the view that the present record in the *Craig* appeal presents essentially a grievance by ore miners generally—the use of plant age instead of company age for seniority purposes—rather than a complaint by blacks that whites were discriminatorily favored in promotion and regression. The testimony relevant to intervenors' application indicated that the focal feature of the seniority system affected the 593 whites and 331 blacks in the same manner: all lost company (ore mine) seniority when assigned to Fairfield Steel Plant. The district court correctly determined that this does not present a palpable Title VII dispute. "The Act does not require a remedy for those not discriminated against." *Gamble v. Birmingham Southern R.R.*, 5 Cir. 1975, 514 F.2d 678, 686 Intervenors now indicate they

are prepared to make a specific showing of discrimination directed at *black* ore miners in violation of Title VII. We conclude that this appeal must be dismissed for want of Title VII jurisdiction, irrespective of other requirements for intervention. Whether the proffered showing should be allowed by way of a repleaded application and new evidence in support of intervention will be a question for the district court on remand.

We now proceed to outline the parameters of the district court's inquiry on remand.

I. The "New" Ford Class Action

Judge Pointer's designation of the "new" *Ford* class dovetails with his most complicated set of findings and reasons for denying back pay to the class's members: "failure of proof" or "equitably determining the true balance of interests." 371 F.Supp. at 1061. In three private class actions, involving around 360 black steelworkers, the court found from the evidence specific aspects of the pertinent seniority structures which it was able to identify as having caused economic injury to certain class members. *Id.* at 1059-60. Sixty one individuals received awards of back pay which were measured with a substantial degree of certitude. In the broader government ("new" *Ford*) action, Judge Pointer denied back pay, not for want of evidence of racial discrimination—such evidence was abundant in statistical form—but because he was unable to isolate specific causal factors to explain earnings disparities between an average black and average white worker in a given production and maintenance line, ability and plant seniority being relatively equal. Noting that under the Fairfield open bidding and job classification scheme "*choice* and *chance*," *id.* at 1053 (emphasis in original), played major roles in predicting every line or pool employee's success—irrespective of race or seniority lock-in, *see id.* at 1059 n.36—Judge Pointer "presumed" damages for purposes of in-

junctive relief, *id.* at 1058, but concluded that individualized back pay could not reasonably be afforded "within the physical and fiscal limitations of the court." *Id.* at 1061-62.

It is simply unclear whether the district court believed that individual awards of back pay to class members must be predicated on proof of each discriminatee's personal economic loss and racially-discriminatory causation at the liability stage (Stage I) of the trial. Appellant Ford argues that Judge Pointer did so believe, and certain portions of the opinion support the argument. *E.g., id.* at 1058 & n.35. On the other hand, the court in fact proceeded to a second, individualized stage, *see Baxter v. Savannah Sugar Refining Corp.*, 5 Cir. 1974, 495 F.2d 437, 443-45, *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974), with respect to the three private classes in which back pay was awarded. 371 F.Supp. at 1059. Moreover, it appears that the court clearly recognized the liability phase's emphasis on proof of broad patterns and practices, as opposed to individual damages. *Id.* at 1053 & n.18, 1061 & n.41. Also, Judge Pointer correctly anticipated our decision in *United States v. Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, where we held that the government may seek and recover back pay for discriminatees in a "pattern or practice" action. 371 F.Supp. at 1061 n.43. In summary, the critical factor by which Judge Pointer distinguished the large government suit from the smaller private classes was his ability in the latter instances to identify the causal discriminatory features of the seniority systems and the manner in which they affected those classes, in contrast with his inability to make such determinations in the former case. *See id.* at 1059.

As if to illustrate this justification for denying back pay, Judge Pointer considered several possible methods by which back pay arguably might have been awarded to the members of the "new" *Ford* class. He rejected these approaches as either inequitable and lacking in probative value (gross comparison of average black and average white earnings in the line of progression); inequitable and overly speculative (factor out the chance of bidding into jobs that turned out less advantageous in the long run); or inequitable and unduly complex in terms of time and expense (use complete hindsight to flow chart all historical vacancies and operational levels; hypothetically assign the most senior blacks to the openings that turned out to be most advantageous). *Id.* at 1060-61. The latter two methods would yield similar, if not identical results, and probably either would have led in some instances to the quagmire, *see Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 260-61. Yet in the cases of the sixty-one blacks to whom he awarded back pay from among some 360 potential recoverees in three private classes, it appears that Judge Pointer did utilize a method which resembled the approaches he rejected for the larger group. It is clear that the court reconstructed eight years of workforce changes in the three departments and hypothetically assigned plant-senior blacks, in order of plant seniority, to the vacancies (redefined in light of the decree) which the court determined those blacks would have occupied but for discrimination. The effect of the bidding system, moreover, is reflected only in the awards within the "original" *Ford* class, where the court found a "significant number of declinations of promotion by both white and black employees." 371 F.Supp. at 1060 n.37. The court elected to disregard the bidding system in the *Hardy* (Ensley Steel Plant blast furnace department) and *McKinstry* (finishing hookers in the Fairfield Plate Mill) classes. The defendants have not complained of the court's approach as to those two classes.

Appellant Ford strongly contends that the district court's denial of back pay to the larger class of nonrecoverees reflects a manifestly erroneous reliance on "difficulty of ascertainment," a theory which this court has discredited as a general defense to back pay liability. *E. g., Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1380; *Pettway, supra.* There are, however, two distinct aspects of both the back pay problem and Judge Pointer's reasoning. First, there is the re-

quirement that the economic disparity—the damages—be the reasonably certain result of unlawful conduct perpetrated against the aggrieved individual or the class to which he belongs. *See* 42 U.S.C. § 2000e-5(g). But second, once a court has determined that a defendant's inequitable conduct caused *some* damages to the class, or to a representative sample of its members, then the burden falls upon the wrongdoer to explain away or disprove the damages which each claimant's evidence arguably supports. In other words, our decisions established that, with respect to computing those damages which are the reasonably certain result of the wrong,

> (1) unrealistic exactitude is not required, [and](2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.

Pettway, supra, 494 F.2d at 260-61 (footnotes omitted); *see also Johnson v. Goodyear, supra.* Although it appears that Judge Pointer recognized these distinct problems, his opinion confuses them. Statements which may fairly be read to rely on the absence of proof of each discriminatee's individual loss at the liability stage add to the confusion. 371 F.Supp. at 1058.

Hence, the decision below yields an anomalous contrast. The evidence demonstrated that, since 1965, certain features of the seniority systems had operated widely to reduce blacks' mobility to better jobs in production and maintenance units, including supervisory positions and trades and crafts, and furthermore to deny blacks the training and preparation necessary for advancement to the better jobs. The district court found that those features perpetuated the effects of past discrimination in violation of Title VII and ordered injunctive reforms. In three relatively small departmental classes, moreover, the court could identify specific features which had caused economic losses to the classes, and awarded back pay to certain class members after taking addi-

tional evidence. Nowhere did the court draw a qualitative distinction between the discrimination practiced against the small classes and that practiced against the "new" *Ford* class, yet it denied back pay throughout the latter group. Thus, the only distinction of substance followed from the district court's inability to discern causal factors as to the larger group's losses in the sense that damages, to be compensable, must be the result of a legal wrong and not some other cause. This inability may have been compounded by a misunderstanding of the role of individual proof at the liability stage (Stage I).

We believe that both of these difficulties can be largely obviated on remand by the fundamental expedient of reexamining the scope of the "new" *Ford* class. In a conscientious effort to eliminate multiplicitous litigation by binding the otherwise unrepresented employees to a Rule 23(b)(2) class judgment in which able counsel on both sides had vigorously and thoroughly litigated the issues, the district court created a class which it found in essence to be so diverse and unmanageable that the effects of unlawful discrimination could not be separated from other plausible, but not demonstrably unlawful, causes of members' reduced earnings. On remand the district court should conduct a hearing and take evidence as to the propriety of the "new" *Ford* class, its scope in terms of the ingredients of the judgment, if any, by which it ought to be bound, and its size and membership. General guidance is contained in our ***en banc*** opinion, *Huff v. N. D. Cass Co.*, 5 Cir. 1973, 485 F.2d 710, although the court should tailor its inquiry on remand to the particular circumstances of this case. We do not intend to restrict the focus of a highly serious determination which must involve great flexibility, and concerning which the district court bears special responsibility. *See Hutchings v. United States Industries, Inc.*, 5 Cir. 1970, 428 F.2d 303, 310-11.

Inasmuch as the issues already have been thoroughly litigated, at least from the standpoint of basic liability and systemic in-

junctive relief, the district court need not fear to tread preliminarily on the merits of a classwide request for back pay. The question on remand will be comprehensive and multifacited: the extent to which the "new" *Ford* class is maintainable in a "meaningful and manageable" sense as a class action seeking monetary relief. *Huff, supra.* As a corollary matter, the court should consider the adequacy of the representation, F.R.Civ.P. 23(a)(4), which in this court has been impressive. In this respect the court should consult *Huff, supra, Johnson v. Georgia Highway Express, Inc.*, 5 Cir. 1969, 417 F.2d 1122, 1125, and Judge Godbold's specially concurring opinion in that case. We also suggest that the court enter findings in support of its determination.

If the district court again concludes that the "new" *Ford* class action should go forward, the matter will not then be ended, nor will it automatically be appropriate to proceed to Stage II, as described in *Baxter, supra.* It seems to us that much trouble might be eliminated—though we encourage the district court's independent judgment on the point—by the use of subclasses under Rule 23(c)(4). *See* the discussion in *Nix v. Grand Lodge of Int'l Assn. of Machinists*, 5 Cir. 1973, 479 F.2d 382, 385-86, *cert. denied*, 414 U.S. 1024, 94 S.Ct. 449, 38 L. Ed.2d 316 (1973). *See also Weathers v. Peters Realty Corp.*, 6 Cir. 1974, 499 F.2d 1197, 1200; *Jenkins v. United Gas Corp.*, 5 Cir. 1968, 400 F.2d 28, 35; *Oatis v. Crown Zellerbach Corp.*, 5 Cir. 1968, 398 F.2d 496, 499; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790 (1972).

It appears that the district court's principal difficulty with the "new" *Ford* class was its size and diverse composition. Those aspects have made meaningful review equally problematic for this court. A large variety of employment practices coalesced to greater and lesser degrees to affect groups of black employees across different plants, departments, job classifications, and earned seniority levels throughout Fairfield Works. In considering whether to designate subclasses for the purpose of back

pay, the district court has at its disposal the injunctive decree of May 2, 1973, the decree's Appendices, and the parties' lengthy stipulation which describes the seniority and job classification systems during Fairfield's history up to the trial. These items provide substantial assistance in identifying those departments and lines which were affected by specific practices ordered enjoined, and the contexts and effects of the unlawful practices. The district court by now is intimately familiar with the case and should encounter no impassable obstacles in drawing subclass lines on the basis of the objective commonality of particular seniority effects as to given groups of employees. We believe that this approach may greatly facilitate the court's determination of the groups of employees within the larger class who are entitled to proceed to Stage II and the presentation of individual back pay claims. Likewise, it should provide this court with a complete picture of the district court's mental processes in the event this lawsuit again comes before us.

In conclusion to this part we dispose of several arguments which are ancillary to the basic class action problems. Initially, we reject appellee United States Steel's argument that appellant Ford lacks standing as a matter of law to represent any class of black employees broader than the "original" *Ford* class, in which his personal back pay claim has been satisfied. The scope of Mr. Ford's standing is a matter which the district court should address in the first instance as an element of the inquiry on remand. The court should consider the question in light of *Jenkins, supra,* and *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34, 42, together with any other relevant cases. Nor do we accept the argument that the designation of a "new" *Ford* class constituted inherent error or an unauthorized substitution of parties. Rule 23(c)(1) does require the court to determine the propriety of a class action "[a]s soon as practicable" after its commencement, but the rule adds that the order "may be conditional, and may be altered or amended before the decision on the merits." What is of immediate concern to us is not the class modification stand-

ing alone, but the analysis upon which it was entered and the mischief which it inadvertently produced with regard to back pay. The modification itself is not unique in either its purpose or its timing. *See, e.g., Hairston v. McLean Trucking Co.*, M.D.N.C. 1974, 62 F.R.D. 642, 663-64. It is literally authorized by Rule 23, provided other constitutional and procedural safeguards are satisfied. Finally, we disagree with appellant Ford's argument that we may venture no review whatever of the class enlargement, for want of a notice of cross-appeal by the appellees. F.R.App.P. 4(a). By contrast with a trial ruling which results in the sustaining or denial of a claim or defense, the certification of a class action involves important considerations of judicial housekeeping. If we assume, somewhat skeptically, that formal notice of cross-appeal is necessary to bring this class action order forward, we would hold nonetheless that the circumstances of this case are sufficient to bring the order within the principle that "the rules themselves ought not be allowed to subvert the 'just' result which 28 U.S.C. § 2106 obliges every appellate court to reach in cases lawfully brought before it for review." 9 J. Moore's Federal Practice ¶ 204.11[5], at 948 (1973) (footnote omitted). In any event, this circuit is committed to the proposition that "[a]ction by the court on maintainability may be triggered by motion of the parties *or on the court's own initiative*." *Huff*, supra, 485 F.2d at 712 (emphasis added). Just as the district court took up the matter without formal request by any party below, this court may properly do likewise in the interest of justice.

II. Back Pay

In Part I we summarized the chief reasons upon which the district court denied back pay to the "new" *Ford* class: the inability to identify and distinguish the various causes of class members' economic losses, perhaps with some emphasis on the difficulty of ascertaining the *amount* of compensable damages.

Just as the court's discussion of these problems is unclear, it is also unclear whether Judge Pointer's concern lay with the proof of economic injury to the class, or with the absence of each member's individual proof at the liability-injunction stage (Stage I). The court also gave other, less prominent reasons for denying back pay: lack of bad faith on the part of the defendants; good faith efforts to comply with the law together with reliance on judicial and administrative decisions which had given positive treatment to steel industry seniority systems; the absence of unjust enrichment to the defendants; and the breadth of other affirmative relief. 371 F.Supp. at 1062-63.

As general or complete defenses to recovery of back pay by *any* employee, the district court's reasons must fail. Controlling precedent disposes of absence of bad faith, no unjust enrichment, and broad injunctive relief as a counterweight for denial of back pay. *See Albemarle Paper Co. v. Moody*, — U.S. —, —, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280, 299 (1975); *Baxter, supra*, 495 F.2d at 442-43; *Pettway, supra*, 494 F.2d at 252-53; *Johnson v. Goodyear, supra*, 491 F.2d at 1376-77; *United States v. Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, 921. With deference to Judge Pointer, we recognize his precognition that the absence of bad faith—or even the presence of good faith—will not by itself defeat a claim for back pay, but is at best a factor to be considered in the larger balance. 371 F. Supp. at 1062. *Accord, Moody, supra*, — U.S. at —, 95 S.Ct. at 2374, 45 L.Ed.2d at 299 (majority opinion); — U.S. at —, 95 S.Ct. at 2389, 45 L.Ed.2d at 315 (Blackmun, J., concurring in the judgment).

Also to be rejected are the burden of proof-equitable balance justifications mentioned earlier, along with the reliance theory, which we treat *infra* as a special defense. With regard to the proof problems, the inquiry and procedure we suggested in Part I should assist the court on remand in identifying particular groups of employees who are entitled, one-by-one, to present

personal claims for back pay. Not unreasonably at the time of his decision, Judge Pointer read certain language in our *Georgia Power* opinion, 474 F.2d at 922, as authorizing a blanket denial of back pay as a matter of discretion in view of the proof, causation, and computation problems posed by the "new" *Ford* class's claim. 371 F.Supp. at 1059, 1061. Indeed, after our subsequent opinion in *Johnson v. Goodyear, supra,* one might have thought that a conflict existed within this circuit as to the circumstances under which a district judge could decline to award back pay to an aggrieved class, despite findings of employment discrimination practiced against the class. Later in *Pettway,* however, all doubt was resolved in favor of the *Johnson v. Goodyear* presumption, which entitles the class to proceed with individual claims for back pay once the class representative has made out a prima facie case of systemic discrimination. There Judge Tuttle (who also authored *Georgia Power*) explained the *Georgia Power* language as an expression of factors to be considered in connection with the *individual claimant's* burden, rather than the class's:

> This holding [in *Johnson v. Goodyear*] is entirely consistent with, and flows from our decision in *Georgia Power* that the presumption in favor of a member of a class discriminated against does not *per se* entitle an employee to back pay without some individual clarification. (citing *Georgia Power,* 474 F.2d at 921-22).

494 F.2d at 259 (emphasis added). Thus, regardless of what might have been a reasonable reading of *Georgia Power* at one time, that case can no longer be taken for the sweeping proposition that "factors of economic reality . . . and . . . the physical and fiscal limitations of the court to properly grant and supervise relief" may operate to preclude an award of back pay to *every* aggrieved employee in a large class action.

Instead, in an effort to relieve tension between management difficulties with numerous, sometimes diverse, claimants

and Title VII's policy of compensation for discrimination-caused economic injuries, this court has established a bifurcated approach in class actions seeking back pay. At Stage I the class must demonstrate a prima facie case of employment discrimination. Sometimes statistical evidence alone will suffice; on other occasions live testimony or additional exhibits may be necessary. At all events, however, the stress at Stage I is upon demonstration of the defendant's broad employment policies and practices, the defendant's rebuttal and business necessity defenses, and the inferences which remain at the close of the evidence. *See United States v. T. I. M. E.—D. C.,* 5 Cir. 1975, 517 F.2d 299 at 315-16; *Rodriguez v. East Texas Motor Freight,* 5 Cir. 1974, 505 F.2d 40, 53-55; *United States v. Hayes International Corp.,* 5 Cir. 1972, 456 F.2d 112, 120. Although the district court may then find liability and conclude that injunctive relief is appropriate, as did the court below, it is improper at Stage I to require any particular discriminatee to prove personal monetary loss. *Baxter, supra,* 495 F.2d at 443.

Thus, the focus at the close of Stage I is still upon the class, as opposed to any particular putative member. As we noted earlier, once the *class* has proven a prima facie case of discrimination—as was done below—then it is *presumptively* entitled to move into Stage II with the presentation of individual back pay claims. *Johnson v. Goodyear, supra.* This presumptive entitlement serves the important function of filling the logical hiatus between large-scale practices and statistically significant effects, which were shown at Stage I, and individual members' claims for sums of money due, which have not yet been demonstrated. At this point the basic question which seemingly perplexed the district court arises: may the court, consistently with the "make whole" purpose of back pay, require a class or subclass to demonstrate some tangible economic loss as a *class or subclass,* attributable to one or more proven discriminatory practices? In other words, may the court condition the presumption upon some quantifiable showing of causation between inequitable conduct

and economic injury-in-fact to an objectively and empirically homogeneous group *qua group*?

We need not further constrict the district court's statutory discretion by saying that it may never do so under any circumstances. Logically, a suit that proceeds as a class action for monetary relief necessarily contemplates some degree of proven economic damage to the class in general, as a result of the defendant's violations. Where, as here, the circumstances of a large class action raise occasional issues of alternative causation —as with the bidding system and the irregular correspondence between hourly wages and job classification—some minimal burden on a given group may be appropriate. On the other hand, the fact that a defendant has managed to discriminate against many people instead of a few is no ticket to freedom from liability to those who suffered less than the most obvious victims. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Moody, supra*, — U.S. at —, 95 S.Ct. at 2371, 45 L.Ed.2d at 296, *quoting Moragne v. States Marine Lines*, 398 U.S. 375, 405, 90 S.Ct. 1772, 1790, 26 L.Ed.2d 339. Moreover, any causation burden which the court imposes on the group, as such, must be not only minimal in weight, but also very general in scope, so as to avoid converting the procedure into the protracted series of claimant-by-claimant trials which *Baxter* commits to a later stage.

With these considerations in mind, and cognizant of our responsibility to "maintain a consistent and principled application of the backpay provision," *Moody, supra*, — U.S. at —, 95 S.Ct. at 2373, 45 L.Ed.2d at 299, we conclude that the district court may require a class or subclass to come forward, as a part of the class or subclass prima facie case, with some threshold showing of economic loss and causation, *if* the defendant's evidence has drawn into substantial question the group's

entitlement to move into Stage II claimant-by-claimant. In all likelihood the defendant's ability to raise substantial doubt about the group's entitlement will occur only rarely. We anticipate that the defendant would have to show convincingly, and with statistically fair exhibits, that a given group of discriminatees outearned, or at least earned as much as, a plant seniority-comparable group of whites during the discriminatory period. Even this kind of showing will not defeat the right of each member of the group to claim back pay at Stage II, if the class representative can make a reasonable argument that the exhibit is distorted, or that a significant number of members might have earned even more than their white contemporaries but for the continued effects of discrimination. Positive proof by each member of the group is not necessary at that point. The representative need only raise on behalf of the class a reasonable inference of "cognizable [economic] deprivations to it as a class," *Baxter, supra*, 495 F.2d at 443, "based on racial discrimination by the employer [or union] in the employment relationship." *Johnson v. Goodyear, supra*, 491 F.2d at 1375. This inference justifies the presumption which entitles the group to move into Stage II.

On remand the district court should reconsider its approach to back pay for the "new" *Ford* class in light of the preceding discussion. The procedures suggested in Part I, *supra*, may well facilitate the court's task. Considerations of judicial efficiency are important, but there is no reason why the need for efficiency cannot be reconciled with what is by now a nearly certain, if not "automatic or mandatory," duty to award back pay to discriminatees who can prove their entitlement to monetary recovery. *Cf. Moody, supra*. In the event the court again decides that any particular group within the affected class should not go forward to Stage II, it must carefully articulate its findings and conclusions. *Id.* — U.S. at — n.14, 95 S.Ct. at 2373 n.14, 45 L. Ed.2d at 299 n.14; *Stevenson v. International Paper Co.*, 5 Cir. 1975, 516 F.2d 103, at pp. 117-118.

Insofar as the district court may conclude that additional back pay is now in order, the burden-of-proof rules respecting individual claims are set forth in *Baxter*, 495 F.2d at 443-45, and *Johnson v. Goodyear*, 491 F.2d at 1379-80. These rules generally contemplate a scheme of proof, computation, and distribution initiated by a series of claimant-by-claimant trials, and we have spoken accordingly heretofore in describing the functions of Stage II.

After consulting *Pettway, supra*, 494 F.2d at 258, with regard to Alabama limitations, the beginning date, and the closing date of the back pay period, the district court, with the assistance of the parties, should strive to the fullest practicable degree to award back pay by reconstructing hypothetically each eligible claimant's work history. This was done in the cases of the sixty-one employees who received back pay following the trial below. 371 F.Supp. at 1060. To the extent that actual, historical vacancies in the employer's workforce can be flowcharted with reasonable accuracy, the court should award the back pay to the minority employees who, in its sound judgment, would have occupied those vacancies but for discrimination, and whose projections show a loss of wages. Part of "[t]he key is to avoid . . . granting a windfall to the class at the employer's expense . . ." *Pettway, supra*, at 262 n.152. Therefore, if the parties can reasonably reconstruct the history of the changes in the Fairfield workforce, the court should utilize those data for identifying "vacancies" in light of its decree, and should not presume that additional vacancies occurred. Apart from protecting the defendant, this method has the virtue of distributing the recovery to the victims who, by the greater likelihood, are entitled to it.

On the other hand, the remainder of "the key" is to avoid "the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly." *Id.* Quite probably there are some aggregations of claimants, similar in plant

seniority and ability, each of whom might reasonably be slotted into the same historical vacancy and awarded a "winner-take-all" sum of back pay. Obviously, this cannot be done if the court is to remain faithful to the actual experience in the plant. Such a situation calls forth the "quagmire of hypothetical judgment" for which *Pettway*, 494 F.2d at 262-63, suggests several alternative solutions. The district court is free to consider the classwide approaches suggested in *Pettway*, as well as any other reasonable methods for making the affected class whole. We commend the court particularly to the use of pro rata shares, *Id.* at 263 & n.154, in those instances where the quagmire persists even after reasonable efforts geared toward greater individual certainty have been attempted. This method involves a distribution across the affected group of the sum which represents the largest loss suffered by a group member who, as likely as any other, could have occupied the vacancy in question but for discrimination. Individual awards can be computed for each member of the group by the use of a linear progression formula. For example, if during a given period white A, with less plant seniority, occupied a job at which he earned $15,000, but blacks B, C, D, E, and F, with respective earnings in lower jobs of $10,000, $11,000, $12,000, $13,000, and $14,000, each were equally capable and substantially equal in superior plant seniority, than their pro rata recoveries for the period could be computed as follows: $5x + 4x + 3x + 2x + x = \$5,000$. The variable, x, comes to roughly $333. Thus, B, whose hypothetical loss is five times greater than F's, recovers about $1,665; C recovers $1,332; D takes $999; E recovers $666; while F, who suffered the least economic injury, recovers $333. The defendants may wish to argue that under no circumstances would employee F, the one with the most damages, or for that matter any of the other discriminatees, have succeeded to the job ahead of A, or ahead of another black. The defendants have the burden of persuasion on the point, by a standard of "clear and convincing" evidence. *Johnson v. Goodyear, supra*, 491 F.2d at 1380.

Of course, the pro rata method will seldom, if ever, work out as conclusively or as simply as the example. The threshold determination of the eligible group of employees will often present complex factual issues. The court that opts for a pro rata method will have to deal with tediously-computed fractional constants in most cases. By suggesting such a method we do not intend to exclude other reasonable alternatives, for we recognize that "the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Moody, supra,* — U.S. at —, 95 S.Ct. at 2373, 45 L.Ed.2d at 299. Also, we reemphasize that alternative methods possessed of superior certainty should be exhausted before the court resorts to racially-drawn classwide comparisons or pro rata approaches. *See* Judge Bell's specially concurring opinion in *Pettway, supra,* 494 F.2d at 267. Similarly, the indiscriminate black-white wage averaging approach advanced by the plaintiffs and rejected by the district court, 371 F.Supp. at 1060 n.40, would seem to be foreclosed by our decision in *Georgia Power* as a basis for making individual awards, *see* 474 F.2d at 921-22, absent at least a precise breakdown of subgroups from the standpoint of plant age *See Pettway, supra,* 494 F.2d at 262, discussing *Stamps v. Detroit Edison Co.*, E.D.Mich.1973, 365 F.Supp. 87, 121-22 [rev'd on other grounds, *sub nom., Equal Employment Op. Com'n v. Detroit Edison Co.*, 6 Cir. 1975, 515 F.2d 301]. In conclusion, we express full confidence in the ability of the district judge to achieve a result consonant with the important compensatory purpose of back pay. The court is free to appoint a master to assist with Stage II, and, as always, the parties are free to negotiate a settlement.

As a caveat to our discussion of back pay, we add a few remarks which are necessary to place this matter in full perspective. On December 19, 1974, Judge Pointer entered, as between the government and the defendants, an amendment which conformed the May 2, 1973 Fairfield decree to the industry-wide consent

decrees which we upheld in *United States v. Allegheny-Ludlum Industries, Inc., supra.* The amendment provides that the back pay under Consent Decree I shall become available to eligible Fairfield employees (1) upon "exhaustion of all appellate proceedings" in *Allegheny-Ludlum,* in which appellant Ford is an intervenor challenging the settlement's legality; and (2) "upon receipt of a remand, if any," from this court in this appeal. Thus, it is clear that the back pay provision of Consent Decree I will not apply to Fairfield Works unless and until both conditions are met. Timewise, there is no way to foretell how quickly the back pay under the settlement will become available at Fairfield, nor could we predict how quickly any class or subclass involved in this appeal might reach the stage of individual back pay relief. Either could involve anywhere from a few weeks to many months. Nevertheless, we point out that the liability stage of the trial in this case was completed almost a year prior to the entry of the consent settlement. Under these circumstances, we conclude that those Fairfield employees who fall within the description of a class or subclass duly certified by the district court on the remand of this case, pursuant to F.R.Civ.P. 23(b)(2), shall look at all times to this case for their back pay. In specific instances this case may yield more money than the consent decree; in others it may yield less. Yet, insofar as this action continues toward final repose as a Rule 23(b)(2) class action, there will be no "opting out" by individual class members at any point. *LaChapelle v. Owens-Illinois, Inc.*, 5 Cir. 1975, 513 F.2d 286, 288 n.7. *But cf. Pettway, supra,* 494 F.2d at 263 n.154. To the extent that the class of eligible black employees under the consent decree overlaps with the Fairfield class or classes—and presently there is considerable overlap—the latter employees' identification with this case will serve the interests of both sides. It will ensure contested, adjudicated compensation to Fairfield employees who are so entitled; it will preserve whatever cohesiveness they achieved prior to the entry of the consent decrees; and it will protect the defendants from the risk of employees gambling on greater or double recoveries under the

consent decree. Conversely, in the event the consent decree funds earmarked for Fairfield become available while this case is before the district court, the defendants ought to be able to use those moneys—to the extent they are adequate—in satisfaction of back pay judgments which may be rendered on remand. There is nothing in the conforming amendment or the May 2 decree which suggests that Consent Decree I's allotment for Fairfield should not be distributed in that fashion, provided the defendants observe the consent decree's terms as to eligibility and method of computation.

III. Other Defenses and Related Issues

Both the company and the union seek to escape back pay liability to the members of the "new" *Ford* class by way of certain affirmative defenses. Unlike the generalized pleas to equity which we dismissed earlier, however, these defenses—to the extent they are valid—either do not call for a blanket denial of back pay to all discriminatees, or else they merely entail equitable apportionment of eventual back pay responsibility as between the defendants.

The company relies on a mass of pretrial and post-trial exhibits which purportedly demonstrate significantly higher black, as opposed to white, rates of refusal to bid on entry-level jobs in the line of progression, voluntary freezing in lower jobs following advancement into the line, and waivers of promotional opportunities under the court-reformed seniority system. The company seeks to use this evidence primarily in an effort to block the class, or particular groups within it, from reaching the individualized back pay stage. This, we conclude, the exhibits cannot accomplish. Initially, there is at best only a tenuous logical connection between the failure of isolated blacks to promote and the issue of economic injury to the broader class of blacks on account of unlawful discrimination. Judge Pointer found that

Fairfield's numerous forms and subforms of occupational, line, and departmental seniority operated to perpetuate the effects of the company's pre-Title VII active racial discrimination in hiring and initial assignments. The company does not question those findings on appeal. Additionally, we must recognize that victims of discrimination frequently hesitate to move into new jobs when, as at Fairfield the price of mobility is loss of seniority earned in a former position. *See United States v. Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 453, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), where the black employee's dilemma is aptly described. Under a history in which blacks were hired into less-desirable jobs and remained behind their white contemporaries in terms of the kinds of seniority necessary for advancement to and security in the higher-paying jobs, the experience under a bidding system neutral on its face is not a persuasive indicator of the progress blacks would have made as a *group* but for seniority discrimination.

On the other hand, we do not wish to demean whatever evidentiary value the company might be able to extract from its exhibits in terms of class or subclass mitigation, as in Judge Pointer's method of awarding back pay among the members of the "original" *Ford* class. *Nor* do we intend to subtract from the probative value of any *particular* employee's declination of a promotional opportunity, either before or after the institution of reformed seniority. In either case it is more likely with the evidence than without it that the employee would have refused the promotion under any circumstances, in which event he should not receive damages for the wages waived. We simply note that these are questions to be considered by the district court on remand. The applicable burden-of-proof rules are those laid down in *Johnson v. Goodyear* and *Baxter, supra.*

In contrast to the company, the union does not rely so much upon factual arguments as upon a rather fragile theory of the law. Essentially, the union contends that any discrimination

for which it may be responsible was the result of good faith efforts to comply with the law, undertaken in reliance upon earlier lower court and administrative decisions which had given positive treatment to similar seniority systems at other basic steel production facilities. Specifically, the union points to *Whitfield v. United Steelworkers*, 5 Cir. 1959, 263 F.2d 546; *United States v. H. K. Porter Co.*, N.D. Ala. 1968, 296 F.Supp. 40, 66-67, *vacated with instructions*, 5 Cir. 1974, 491 F.2d 1105; *United States v. Bethlehem Steel Corp.*, W.D.N.Y.1970, 312 F.Supp. 977, *modified and remanded*, 2 Cir. 1971, 446 F.2d 652; *Matter of Bethlehem Steel Corp. (Sparrows Point Plant)*, OFCC Dkt. 102-68, Dec. 18, 1970, *rev'd by Sec'y of Labor*, Jan. 15, 1973, EPD ¶ 5128; and certain language in *Local 189, United Papermakers v. United States*, 5 Cir. 1969, 416 F.2d 980, 993, *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970). From these cases the union gleans respectable support for its contention that, at least until the Second Circuit's decision of June 21, 1971 in *Bethlehem Steel*, it appeared that the remedies of plant-service seniority and rate retention would not be applied to the steel industry due to the dangers and complexities of the steel manufacturing process. Moreover, when the Second Circuit issued its opinion in *Bethlehem Steel*, the district court decision in *H. K. Porter* was pending on appeal to this court, and remained on this court's docket for almost three more years, despite interim requests by the government and the union for this circuit's response to the issue of "rightful place" relief in the steel industry. Thus, the union insists that the defendants in this case reasonably relied on the prior decisions in maintaining and defending the Fairfield seniority systems, and that the prior decisions gave positive notice of a steel industry business necessity exemption from the remedies which were first ordered in the tobacco and paper industries. *See Quarles v. Philip Morris Co.*, E.D.Va.1968, 279 F.Supp. 505; *Local 189, supra.* The union therefore asks us to exonerate it from potential back pay liability on grounds of "exceptional circumstances" or "substantial injustice."

The appellants characterize the union's theory of a "unique" steel industry litigation history as an elaborate appeal to the "unsettled state of the law"—a theory which we have thoroughly rejected as a defense to back pay liability under both Title VII and Section 1981. *See Johnson v. Goodyear, supra*, 491 F.2d at 1377; *Pettway, supra*, 494 F.2d at 255 & n.132. *Cf. Moody, supra*, — U.S. at — & n.15, 95 S.Ct. at 2374 & n.15, 45 L.Ed.2d at 299 & n.15. Despite the union's lack of bad faith and Judge Pointer's finding that it "had good reason . . . at least in this circuit," 371 F.Supp. at 1062, to believe that the Fairfield seniority systems comported with the law, we believe that the appellants are fundamentally correct. As we stated in *Johnson v. Goodyear, supra*:

> At least since July 2, 1965, the effective date of Title VII, the employers of this nation have been on notice that employment discrimination based on race, whether overt, covert, simple or complex, is illegal. In this case, the employer has been violating the Act as to some employees since that date. If we were to accept the employer's position the effective date would be advanced at least to the date of the *Griggs* [*Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158] opinion. This result would be untenable and completely at odds with the Congressional purpose evidenced by enacting Title VII. Title VII is strong medicine and we refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the strong remedial spirit of the act. (footnote omitted).

Accord, Pettway, supra, 494 F.2d at 255-56.

Title VII applies of course to unions which are parties to the collective bargaining agreement as well as to employers. *See Johnson v. Goodyear, supra*, at 1381; *Carey v. Greyhound Bus Co.*, 5 Cir. 1974, 500 F.2d 1372, 1379. Both were placed on notice of the law at the same time. The gist of the union's

argument, however reasonable it may appear depending on the orientation from which one reads the cases cited in support thereof, reduces to a contention that the defendants should not somehow be penalized for reliance on what turned out to be an erroneous view of the law. We dismissed a similar argument in the context of the public accommodations provisions of Title II of the 1964 Civil Rights Act, *see Miller v. Amusement Enterprises, Inc.*, 5 Cir. 1970, 426 F.2d 534, 536: "[t]he actions of Fun Fair Park became subject to the prescribed judicial relief not because the Court said so, but rather because the Court said —even perhaps for the very first time—that the Congress said so." We reach the same conclusion here, without consideration of whether other cognizable "exceptional circumstances" or "substantial injustices" may exist apart from compliance with state protective statutes which have not been ruled inconsistent with Title VII. *Cf. Moody, supra,* — U.S. at — nn. 17, 18, 95 S.Ct. at 2374, nn. 17, 18, 45 L.Ed.2d at 299, 300 nn. 17, 18; *Pettway, supra,* 494 F.2d at 254; *Johnson v. Goodyear, supra,* 491 F.2d at 1377. *See also Stevenson v. International Paper Co., supra,* at 113-114 ("government [OFCC] imposed" discrimination at the plant involved in the lawsuit). The crux of the matter is that the defendants in this case took a particular legal position in litigation over the issue of their seniority system's legality. This was their right, but with it came the usual risks of litigation, including the risk of civil liability. The defendants' position failed them; the statute and the authoritative cases construing it provide for back pay in order to make the victors whole; and we decline to subvert that integral scheme with a crazy-quilt pattern of different back pay liability dates, industry-by-industry, plant-by-plant, on the basis of a few district court decisions, administrative panel rulings, and nonprecedential appellate language, all involving factual settings at places other than Fairfield Works. To embark upon such a course would entangle the compensatory, nonpenal purpose of back pay in a web of judicial gamesmanship.

Nevertheless, one legitimate defense of sorts remains available to the union with respect to back pay liability. In the three private class actions in which Judge Pointer awarded back pay below, the International was absolved of back pay responsibility because it "was not really responsible for the practices giving rise to the three back-pay awards." 371 F.Supp. at 1060 n.39. Instead, the court assessed the awards one-half against the company and one-half against the offending locals. On remand the parties are free to litigate these same issues in connection with any back pay which may be awarded in favor of the members of the "new" *Ford* class. The apportionment problem is initially one for the district judge, and we intimate no further view except to suggest that the court consider the matter in light of our recent cases. *See Guerra v. Manchester Terminal Corp.*, 5 Cir. 1974, 498 F.2d 641, 655-56; *Gamble v. Birmingham Southern R.R., supra,* 514 F.2d at 686-87; *Johnson v. Goodyear, supra,* 491 F.2d 1381-82, and any other relevant cases which the parties may bring to the district court's attention. The district court also should enter specific findings in support of its determinations of back pay responsibility.

IV. Conclusion

We have given careful consideration to all other contentions on appeal and find them to be without merit.[1] For the

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[1] For example, we note that the company's request for a trial by jury has been foreclosed in this circuit by *Johnson v. Georgia Highway Express, supra,* 417 F.2d at 1125. We are also aware that the company's alternative plea for recognition of substantial discretion in the district judge over whether to award back pay is supported by Justice Rehnquist's concurring opinion in *Moody, supra,* — U.S. at —, 95 S.Ct. at 2384-87, 45 L.Ed.2d at 312, 313. On the other hand, our cases, *e. g., Pettway, supra,* hold that the district court's discretion to deny back pay is "narrow." 494 F.2d at 252. The only "special circumstance" we have recognized is that of a conflicting state statute which required the employer to violate Title VII. *See*

reasons discussed heretofore the *Craig* appeal is dismissed. The decision of the district court denying back pay, which was brought forward by the *Ford* appeal, is vacated and remanded for further proceedings consistent with this opinion.

LeBlanc v. Southern Bell Tel.&Tel. Co., E.D.La. 1971, 333 F.Supp. 602, *aff'd per curiam*, 5 Cir., 460 F.2d 1228, *cert. denied*. 409 U.S. 990, 93 S.Ct. 320, 34 L.Ed.2d 257 (1972). Moreover, this circuit has already extended the principle of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66, 51 S.Ct. 248, 251, 75 L.Ed. 544, 550 (1931), to Title VII back pay cases. ("Difficulty of ascertainment is no longer confused with right of recovery."). *Johnson v. Goodyear, supra*, 491 F.2d at 1380. As Mr. Justice Rehnquist observed in *Moody*, this principle's classic application has occurred in suits for money damages, in which the parties ordinarily are entitled to a jury trial. Thus, to reconcile this variety of competing tensions in the context of Title VII is no simple task. Yet we have endeavored conscientiously herein to follow the controlling precedents of this court and of the Supreme Court. In the absence of a material conflict between our decisions and the majority opinion in *Moody*, we are bound to do so. Though perhaps, as the union argues, some degree of conflict now exists, *compare Moody, supra*, — U.S. at —, 95 S.Ct. at 2371-72, 45 L.Ed.2d at 296-297, *with Pettway, supra*, 494 F.2d at 253, we believe that the inconsistency is superficial to this case. Our lawsuit is now well beyond the point at which the "reasonably certain prospect of a back pay award" operates as an incentive to voluntary compliance. *Cf. Moody, supra*, — U.S. at —, 95 S.Ct. at 2371, 45 L.Ed.2d at 296. Instead, we are concerned with back pay as "an equitable award for *past* economic injury." *Pettway, supra* (emphasis in original). From the standpoint of the *compensatory* purpose of back pay, which is at issue here, we perceive no conflict whatever between previous decisions of this court and the majority opinion in *Moody*.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CLARIFYING ITS PREVIOUS OPINION AND DENYING REHEARING

United States of America,
Plaintiff-Appellant,

v.

United States Steel Corporation et al.,
Defendants-Appellees.
John S. Ford et al.,
Plaintiffs-Appellants,

Clifford Craig and L. G. Phillips,
Movants-Appellants,

v.

United States Steel Corporation et al.,
Defendants-Appellees.

No. 73-3907.

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

Appeals from the United States District Court for the Northern District of Alabama.

On Petitions for Rehearing and Petition for Rehearing En Banc

(Opinion Oct. 8, 1975, 5 Cir., 520 F.2d 1043)

Before Thornberry, Morgan and Clark, Circuit Judges.

Per Curiam:

The petitions for Rehearing are denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition of United States Steel Corporation for Rehearing En Banc is denied.

By way of clarification, all parties should recognize that the district court's final certification of the "new" Ford class is the door that bars opting out by class members. The panel's original opinion in this cause was not intended to rule out the tender of back pay under the Consent Decree approved by this Court in *United States v. Allegheny-Ludlum Industries, Inc.*, 5th Cir. 1975, 517 F.2d 826. The district court will, on remand, define the "new" *Ford* class in such a way as to exclude those persons who elect to accept such back pay tenders. *Cf. LaChapelle v. Owens-Illinois, Inc.*, 5th Cir. 1975, 513 F.2d 286, 288 n. 7.

CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000e-5 AND 6 PRIOR TO 1972 AMENDMENTS

2000e-5

Prevention of Unlawful Employment Practices

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment prac-

tice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the pro-

cedures set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in

which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

(h) The provision of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23,

1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceeding brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

2000e-6

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to

this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000e-5 AND 6 INCLUDING 1972 AMENDMENTS

§ 2000e-5. Enforcement provisions—Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the

charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) and (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty

days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Same; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment

practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the At-

torney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is

available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunction; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled,

or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

§ 2000e-6. Suits by Attorney General

(a) Complaint. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [42 USCS §§ 2000e-2000e-17], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Jurisdiction; three-judge district court for cases of general public importance; hearing, determination, expedition of action, review by Supreme Court; single-judge district court; hearing, determination, expedition of action

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be,

to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Transfer of functions, etc., to Commission; effective date; prerequisite transfer; execution of functions by Commission

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President

submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

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42 U.S.C. § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full

and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

FEDERAL RULES OF CIVIL PROCEDURE
RULES 23 AND 25

Rule 23. Class actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all

members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural

matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 25. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion. the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1475, 75-1478

UNITED STATES STEEL CORPORATION,
Petitioner,

—v.—

JOHN S. FORD, *et al.*

UNITED STEELWORKERS OF AMERICA AFL-CIO-CIC, and its LOCAL UNIONS 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662 and 4203,
Petitioners,

—v.—

JOHN S. FORD, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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—v.—

JOHN S. FORD, *et al.*

UNITED STEELWORKERS OF AMERICA AFL-CIO-CIC, and its LOCAL UNIONS 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662 and 4203,

Petitioners,

—v.—

JOHN S. FORD, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Statement

The district court had found that the defendants Steelworkers and United States Steel Corporation, petitioners here, had engaged in patterns and practices of racial discrimination in employment which required injunctive relief designed to remedy the effects of that discrimination with respect to the seniority and transfer system, training and apprenticeship programs, and selection for plant

protection, clerical and supervisory jobs. (Pet.A18-A41[1]) Neither the Steelworkers nor U.S. Steel challenged the district court's findings of widespread racial discrimination. (See Pet.A77) Rather the Steelworkers and U.S. Steel have petitioned for review of the Fifth Circuit's holding that backpay should be awarded to compensate those black workers who suffered lost earnings as a result of the discriminatory practices. Additionally, the Company further petitioned for review of the district court's enlargement of the class represented by John S. Ford et al. to include all the black workers at Fairfield Works who were not otherwise being represented in a private class action.

The district court's enlargement of the *Ford* class was not done contemporaneously with the entry of judgment as U.S. Steel states in its petition. (Pet. at 10). The class was re-defined in the district court's decree entered on May 2, 1973. (Pet.A38) Judgment was not entered by the district court until August 10, 1973. *United States* v. *United States Steel Corporation*, 6 EPD ¶ 8790 (N.D. Ala. 1973). Since neither petitioner included the Judgment of the district court in the appendix to their petitions, the respondents have attached it as an appendix to this brief. (1a-4a)

Reasons for Denying the Writ

The six questions presented by U.S. Steel and the three-part question presented by the Steelworkers challenge two aspects of the Fifth Circuit's decision: the reversal of the district court's denial of backpay to 2,700 black steelworkers who had their employment opportunities restricted by

[1] Citations in this form are to the Appendix to the petition for certiorari filed by United States Steel Corporation in No. 75-1475.

the discriminatory practices of the petitioners and the affirmance of the legality of the district court's re-definition of the *Ford* class.[2]

1. *The Backpay Ruling*

The Union in its three-part question and the Company in its last three questions raise defenses of lack of bad faith, good faith efforts to comply with the law, the unsettled state of the law, the absence of unjust enrichment to the defendants and the breadth of other affirmative relief.[3] No question of law is being raised by these petitions that was not settled by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In essence, petitioners here seek a rehearing of the decision in *Albemarle*.

Additionally, petitioners argue that the difficulties of ascertainment of the backpay remedy for individual members of the class was a lawful basis for the district court's

[2] The Fifth Circuit however vacated the lower court's definition of the class and remanded to the lower court to take evidence as to the class "propriety", "scope", "size" and "membership". The Fifth Circuit further stated that "the question on remand will be comprehensive and multifaceted" and suggested that the district court enter findings of fact in support of its determination. (A 83-84).

[3] The Union in attempting to argue that the lower courts found discriminatory steel seniority systems to be lawful under Title VII misstated the history of that litigation. The Union relies on a pre-Title VII decision, *Whitfield* v. *United Steelworkers of America*, but omits its explicit reversal in 1970, *Taylor* v. *Armco Steel Corporation*, 429 F.2d 498 (5th Cir. 1970). Moreover, at the time when the appeal was argued before the Fifth Circuit in *United States* v. *H.K. Porter Company, Inc.* in April, 1970 "the Court, from the bench, indicated that major changes in the seniority and other systems at the plant were required in order to achieve compliance with Title VII of the Civil Rights Act of 1964 . . .", 491 F.2d 1105 (1974). Petitioner, in effect, seeks exemption from liability for backpay under Title VII on the ground that it was in good faith compliance with pre-Title VII law!

use of its discretion in denying backpay relief for the class. This is contrary to the rule of this Court in *Albemarle* that "given a finding of unlawful discrimination, backpay should be denied only for reasons, which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." [4] (422 U.S. at 421)

2. *Standing of the Named Plaintiff*

The Company's challenge to the standing of the named plaintiff on appeal conflicts with settled law that the cause of action in a class action survives the mootness of the claim of the named plaintiff when the issues as to the class is certain to come before the courts, *Sosna* v. *Iowa,* 419 U.S. 393 (1975). The instant case satisfies the three criteria for the survival of the class action after the satisfaction of the named plaintiff's claim which this Court set down in *Sosna* (at 402). It is undisputed that John S. Ford had standing to sue as the named plaintiff in the original suit; that the class was certified by the district court and that the controversy is still alive.

On petitioner's theory it would be possible to scuttle a class action by simply settling the claim of the named plaintiff. Denying the right to appeal to the class because the named plaintiff has been paid would generate precisely

[4] Petitioners seek relief from their obligation to make the injured members of the class whole on the ground that a great many were injured in the context of a complex plant seniority structure thereby creating difficulties of ascertainment of individual remedies. If allowed, this would lead to the anomaly that the only safe discrimination to practice is mass discrimination. As Judge Thornberry put it, ". . . the fact that a defendant has managed to discriminate against many people instead of a few is no ticket to freedom from liability to those who suffered less than the most obvious victims." (A.90)

the evil of the multiplicity of law suits that class actions were designed to prevent.

3. *Modification of the Class*

Petitioner argues that since the class was modified "after trial at judgment" (U.S. Steel Pet. at 2, 10) it was in violation of Rule 23(c)(1) which permits alteration or amendment of the class "before the decision on the merits".

a) Petitioner's question is premature. The proper class has yet to be defined. The Fifth Circuit vacated the lower court's definition of the class and remanded for a hearing on this "comprehensive and multifaceted" question to determine the "propriety", "size", "scope" and "membership" of the class. (A 83-84)

b) Petitioner is in error on the facts, in any case. The decree modifying the class was entered on May 2, 1973. The Judgment of the court was rendered on August 10, 1973. The class was therefore altered "before the decision on the merits" in compliance with Rule 23(c)(1).[5] See *supra* at n. 2.

c) Finally petitioner's reliance on Rule 23(c)(1) is misplaced. In a (b)(2) class action, such as the case at bar, the relevant rule on the timing of the

[5] Even if the class had been amended at the time of judgment, as petitioner incorrectly asserts, there would still have been compliance with Rule 23(c)(1) as Seventh Circuit explained in *Jimenez* v. *Weinberger,* 523 F.2d 689 (1975): ". . . the explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicate that in some cases the final certification need not be made until the moment the merits are decided." (at 697)

determination of the scope of the class is Rule 23(c)(3). That rule states: "the *judgment* in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, *shall* include and describe those whom *the court* finds to be members of the class." (emphasis added) When Judge Pointer in his Decree of May 2, 1973 described those whom he found to be members of the class, he was in strict compliance with the Federal Rules of Civil Procedure.[6]

d) Petitioner's additional complaint of lack of notice and hearing as violative of its right to due process is clearly frivolous. There was no element of surprise or prejudice to the petitioner when the class represented by Ford, et al. was expanded to include individuals who were represented by the United States in a "pattern and practice" suit consolidated for trial with *Ford*, and whose *claims had been thoroughly litigated* at a lengthy trial at which petitioner had full opportunity to present evidence.[7] (A 42-43)

4. *The Class Action Tolling Rule*

Petitioner cites the rule in *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974) as authority that the statute of limitations had run for the 2,700 individuals thereby precluding their entry into the class.

---

[6] In *Jimenez*, ibid., the Seventh Circuit construed 23(c)(3) as follows: "the language of subparagraph (c)(3) would seem to permit the entry of a single order determining both the merits and the identity of the class. Certainly there is nothing in the rule expressly depriving the district court of power to enter such an order." (523 F.2d at 698)

[7] The petitioner, United States Steel Corporation, put on evidence for approximately thirty-five days of trial.

In *American Pipe*, a class certification was denied and the suit went forward as a private action. The issue before this Court was whether the statute of limitations had run for those individuals, who would have been members of the class had it been certified, with respect to their right to intervene in the private action. The question of the rights of intervenors to get into court where a class action has been denied is irrelevant to the issue of the appropriate inclusion in an aleady certified class of new members whose claims had already been litigated at a consolidated trial.

Petitioner strives for relevance by quoting *American Pipe* as follows: "We are convinced that the rule most consistent with federal class action procedures must be that commencement of a class action suspends the statute of limitation *as to all asserted members of the class . . .*" (Pg. 11 of petition: emphasis by petitioner). Therefore petitioner suggests that since the added members of the new *Ford* class had not been the "asserted" members of the old *Ford* class, then the statute of limitations had run for them. But petitioner's quotation omits the second part of the sentence which reads, "who would have been parties had the suit been permitted to continue as a class action." (414 U.S. 538, 554). Thus, even if the rule in *American Pipe* is relevant, this omitted part of the sentence suggests that the statute of limitations *would* have been tolled for the 2,700 blacks who were not in the class originally because they clearly "would have been members of the class had the suit been permitted to continue as a class action." In the instant case a class action was permitted and the new members were in fact included in the class prior to the entry of judgment. As this Court stated in *American Pipe*, "Thus, the commencement of the [class] action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as

well as for the named plaintiffs." (at 551). Not only were the 2,700 blacks "those who *might* subsequently participate in the suit", they were in fact those who had already participated in the suit. *A fortiori* the statute of limitations tolled for them. The court below properly, indeed necessarily, included them in the class to which the judgment would apply to avoid the possibility of 2,700 private lawsuits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 70-906

UNITED STATES OF AMERICA,

Plaintiff;

Civil Action No. 66-343

LUTHER MCKINSTRY, *et al.*,

Plaintiffs;

Civil Action 66-423

WILLIAM HARDY, *et al.*,

Plaintiffs;

Civil Action No. 66-625

JOHN S. FORD, *et al.*,

Plaintiffs;

Civil Action No. 67-121

ELDER BROWN, *et al.*,

Plaintiffs;

Civil Action No. 68-204

ELEX P. LOVE, *et al.*,

Plaintiffs;

Civil Action No. 69-165

JAMES DONALD, *et al.*,

Plaintiffs;

—VS.—

UNITED STATES STEEL CORPORATION, *et al.*,

Defendants.

Appendix

Judgment

It is ORDERED, ADJUDGED and DECREED as follows:

1. *McKinstry* v. *U. S. Steel Corp.*, CA 66-343.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1013, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the eight class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for employment taxes and withholding as may be required by applicable law.

(b) *Attorney's fees.* Said defendants shall each pay to U. W. Clemon, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $29,250 (of which $4,250 represents reimbursement of expenses).

2. *Hardy* v. *U. S. Steel Corp.*, CA 66-423.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1489, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the twenty class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for tax withholding and employment taxes as may be required by applicable laws.

(b) *Attorney's fees.* Said defendants shall each pay to Oscar W. Adams, Jr., as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j),

Appendix

the sum of $26,500 (of which $4,000 represents reimbursement of expenses).

3. *Ford* v. *U. S. Steel Corp.*, CA 66-625.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1733, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the thirty-three class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for tax withholding and employment taxes as may be required by applicable laws.

(b) *Attorney's fees.* Said defendants shall each pay to James K. Baker, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $29,250 (of which $4,250 represents reimbursement of expenses).

4. *Brown* v. *U. S. Steel Corp.*, CA 67-121.—The defendants United States Steel Corporation and Local Union 1733, United Steelworkers of America, AFL-CIO-CLC, shall each pay to J. Richmond Pearson, as Attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $4,500.00.

5. *Love* v. *U. S. Steel Corp.*, CA 68-204.—The defendants United States Steel Corporation and Local Union 1489, United Steelworkers of America, AFL-CIO-CLC, shall each pay to J. Richmond Pearson, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $4,500.00.

6. *Donald* v. *U. S. Steel Corp.*, CA 69-165.—The defendants United States Steel Corporation and Local Union

1013, United Steelworkers of America, AFL-CIO-CLC, shall each pay to Demetrius C. Newton, as attorney's fees for the plaintiffs in such case under 42 U.S.C.A. § 2000e-5(j), the sum of $8,500.00.

7. *Denial of other claims.*—All claims for back pay and attorney's fees are, except as provided in paragraphs 1 through 6 hereof, denied.

8. *Line of Progression Modification.*—Attached hereto is a Line of Progression for Unit 1201, No. 4 Galvanizing Line, Fairfield Steel Plant, which is hereby substituted for the line of progression chart for such unit as contained in the decree dated May 2, 1973. Such change is effective as of August 1, 1973, notwithstanding the 60-day notice provision contained in paragraph 4 of the May 2, 1973, decree.

9. *Order under Rule 54(b).*—In paragraph 15 of the May 2, 1973, order the court severed those claims in civil action 70-906 relating to testing procedures, and such claims have not been determined by this court but remain for further consideration. As to all other claims in the cases appearing the style of this judgment, the court now under Rule 54(b) expressly determines that there is no just reason for delay and expressly directs that judgment, as contained in the decree of May 2, 1973 and this judgment, be entered as a final judgment as against all parties. Final judgments have previously, on May 2, 1973, been entered in CA 69-68 and CA 71-131, which had been consolidated for trial with the cases appearing in the style of this judgment.

Done this the 10th day of August, 1973.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1475

UNITED STATES STEEL CORPORATION,
Defendant-Petitioner,

and

UNITED STEELWORKERS OF AMERICA, et al.,
Defendants-Respondents,

v.

JOHN S. FORD, et al.,
Plaintiffs-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL AND REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1475

UNITED STATES STEEL CORPORATION,
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and

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Defendants-Respondents,

v.

JOHN S. FORD, et al.,
Plaintiffs-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL AND REPLY BRIEF

This supplemental and reply brief is filed (1) to direct the Court's attention to the recent decision of the Fifth Circuit Court of Appeals in *Swint v. Pullman-Standard*, Civ. No. 74-3726 (5th Cir. Aug. 30, 1976); (2) to note the similarities between the issues presented in the instant petition for certiorari and the issues in certain other petitions for certiorari which this Court has recently granted; and (3) to reply briefly to respondents' "Brief in Opposition to Certiorari."

A. **Swint v. Pullman-Standard.**

In its Petition for Certiorari United States Steel Corporation stated as its fourth and fifth questions presented:

> 4. Whether the Fifth Circuit's continued adherence to the 'special circumstances' test in Title VII back pay determinations, comports with this Court's decision in *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2363 (1975) and with the decisions of other courts of appeals?
>
> 5. Whether a district court may in its equitable discretion consider difficulty of ascertaining a sufficient causal connection between the employer's conduct and alleged damages, and difficulty of ascertaining any amount of back pay lost by a particular claimant as a result of employer conduct, in determining the propriety of an award of back pay under Title VII?

On August 30, 1976 the Fifth Circuit decided *Swint v. Pullman-Standard*, Civ. No. 74-3726. The *Swint* decision is important to the present petition because in *Swint* Judge Clark, writing for the Fifth Circuit, explains that portion of the holding below from which petitioner's issues four and five arise. Judge Clark, who had also been on the panel in *Ford*, said of the Fifth Circuit's *Ford* opinion:

> the [district] judge . . . denied back pay in [*Ford*] because plaintiffs had not proven harm caused by discrimination.
>
> The focus of our appellate reversal . . . [in *Ford*] was the erroneous assignment to plaintiffs of the burden of presenting evidence sufficient to justify a back pay award to the class.
>
> For purposes of back pay relief [*Ford*] holds that economic harm is not required to be shown as an element of a prima facie case unless the defendant has shown "convincingly" by "statistically fair exhibits" that the class earned "at least as much as a plant-seniority comparable group of whites."

The holding by the Fifth Circuit in *Ford*, explained by Judge Clark, conflicts directly with the burden of proof rule stated in *Local 974, United Transportation Union v. Norfolk and Western Ry. Co.*, — F.2d —, —, 11 FEP Cas. 410, 413 (4th Cir. 1975) ("[T]o justify an award [of back pay] plaintiffs must prove that there is a class whose members suffered economic loss as a result of discrimination."); and in principle with the decision of this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case . . .") and the Sixth Circuit's opinion in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (1974).

The Fifth Circuit has, contrary to established burden of proof rules, eliminated plaintiff's traditional burden of proving some economic loss caused by the alleged unlawful practice as a prerequisite to recovering damages, and cast an impermissible negative burden of proving no economic loss on the defendant. Worse yet, it has held that defendant's misplaced burden can be met only by a showing that "the class earned 'at least as much as a plant-seniority comparable group of whites,' " or, more simply stated, by showing income parity.

Whenever the average income of whites exceeds that of blacks, the Fifth Circuit has mandated an award of back pay and the only questions remaining are *who* is entitled to the back pay and how it is calculated (the Fifth Circuit's so-called "Stage II"). Factors in the social system outside the plant itself are ignored in determining the entitlement of the *class* to back pay, and every case where blacks on the average earn less than whites automatically goes to individual adjudications (Stage II) (in this case some 2700 in number) without reference to whether

income differences may have been caused by nondiscriminatory factors other than race (i.e., in the present case defendant's trial evidence unrefuted on the record explained differences in income by differences in average education, experience, qualifications, and refusals to advance) and without any consideration whether blacks, on the average, would have earned more under the seniority system as ordered modified, which are facts considered irrelevant by the Fifth Circuit at "Stage I." Also ignored by the Fifth Circuit in *Ford* is the trial court's equitable discretion in determining whether an award of back pay is appropriate. *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2362 (1975). This discretion is constitutionally compelled in this case where a jury trial was requested, but denied based on its existence. *See Curtis v. Loether*, 415 U.S. 189, 196-97 (1974).

A better result, and a result consistent with traditional burden of proof rules, would be to permit a plaintiff to obtain class-wide injunctive relief without proof of economic injury, but to require that a *plaintiff* who also seeks back pay prove, as part of his *back pay case* for the class, that the class he represents has suffered *some economic injury as a result of discrimination*. If this is done, the defendant should be allowed the opportunity to go forward and (1) to rebut the plaintiff's suggestion that a difference in income is the result of discrimination; or (2) show some other reason why, even assuming economic injury as a result of discrimination, back pay is inappropriate under *Albemarle*. The defendant should be permitted this opportunity to rebut or offer some other proper basis for a back pay denial prior to a setting of 2,700 individual adjudications, and the ultimate burden of persuasion should remain with the plaintiffs.

The Fifth Circuit's two-stage procedure, as applied, has destroyed the "class" nature of Title VII class actions and obliterated the *Albemarle* standards. Whether this result is proper under the Civil Rights Act of 1964, *Albemarle* and traditional rules respecting the burden of proof is a question which warrants review by this Court.

B. Petitions for Certiorari Granted.

This Court has recently granted certiorari to review the Fifth Circuit Court of Appeals' decisions in *United States v. T.I.M.E.-DC, Inc.*, 517 F.2d 299 (5th Cir. 1975); *Rodriguez v. East Texas Motor Freight System, Inc.*, 505 F.2d 40 (5th Cir. 1974); and *Castaneda v. Partida*, 524 F.2d 481 (5th Cir. 1975). *T.I.M.E.-DC* and *Rodriguez* involve trucking industry seniority systems alleged to be racially discriminatory, and *Castaneda* involves an allegation of racial discrimination in the selection of a grand jury. The *T.I.M.E.-DC*, *Rodriguez*, and *Castaneda* petitions each present questions similar to certain questions presented in the present petition.

For example, in *Rodriguez*, East Texas Motor Freight has been granted a petition for certiorari to present among other questions the following:

> Whether absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class, the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the plaintiff?

East Texas Motor Freight System, Inc. v. Rodriguez, No. 75-718, Petition at 3. The second question presented in the present petition is similar:

> Whether Federal Rules of Civil Procedure (F.R.C.P.) Rule 23(c)(1) authorizes the substitution of new plaintiff class members and addition of new defendants, where these class alterations are (1) after trial at judgment and (2) without notice or a hearing?

T.I.M.E.-DC will present to this Court, among other questions, to question:

> Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

T.I.M.E.-DC, Inc. v. United States, No. 75-672, Petition at 2. Question 6 presented by the present petition is:

> Whether a district court may in its equitable discretion consider employer good faith, lack of notice of alleged discrimination, and reliance on the state of the law in determining the propriety of an award of back pay under Title VII?

U. S. Law Week summarizes the questions presented in *Castaneda v. Partida*, No. 75-1552 as:

> Did evidence submitted by petitioner in this case rebut inmate's prima facie case of discrimination in grand jury selection?

and,

> Is court of appeals' decision in this case in conflict with decisions of this Court?

44 U.S.L.W. 3713 (June 15, 1976). These *Castaneda* questions are similar to the present petition's questions 4, 5 and 6.

The ultimate holdings of this Court in *T.I.M.E.-DC, Rodriguez*, and *Castaneda* bear therefore on the proper resolution of several of the issues presented in this case. Were it not for the fact that the present petition presents other important questions not raised in *T.I.M.E.-DC, Rodriquez*, and *Castaneda*,

certiorari could be granted in the present petition and the case simply held pending decision in *T.I.M.E.-DC, Rodriguez*, and *Castaneda*. But the present petition does present important questions which will not be decided by *T.I.M.E.-DC, Rodriguez*, and *Castaneda*. *T.I.M.E.-DC, Rodriguez*, and *Castaneda* will not directly answer the question whether the Fifth Circuit's continued application of a "special circumstances" test is permissible despite *Albemarle*. They will not specifically determine whether a plaintiff in a class action as part of his back pay case must prove some economic loss to the class. They will not decide petitioner's question 1 concerning the standing of a class representative on appeal when he does not appeal for himself, and they will not clarify the application of the *American Pipe* class action tolling rule to Title VII cases. These are important issues warranting review by this Court, and are questions which this Court can conveniently and expeditiously consider while reviewing the procedural questions presented in *T.I.M.E.-DC, Rodriguez*, and *Castadena*.

C. Respondent's Opposing Brief Suggests the Appropriateness of a Writ of Certiorari in This Case.

The importance and substantiality of the questions presented in the petition for certiorari in this case, and the need for review by this Court, are highlighted by the opposing brief, which was only filed by respondent Ford after he was specifically requested to respond by this Court.

Initially, respondent Ford, in his "Brief in Opposition to Certiorari", does not deny that the Fifth Circuit in reversing the District Court applied the "special circumstances" test and totally rejected the District Court's equitable considerations of failure to prove causal connection, employer and union good faith, lack of notice, and reliance on the state of the law. Nevertheless, in attempting to avoid the aforesaid questions 4, 5,

and 6 raised in the petition, Mr. Ford states that "no questions of law are raised by these petitions that was not settled by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)." In fact, if *Albemarle* is dispositive of this action, it holds directly contrary to the Fifth Circuit's analysis below, and the Fifth Circuit's conflict with the *Albemarle* decision of this Court is adequate grounds in itself upon which to grant certiorari.

Mr. Ford fictionalizes the facts of this case when he takes the position in his brief that he has always had standing to sue and that *Sosna v. Iowa*, 419 U.S. 393 (1975) is dispositive. In reality, Mr. Ford never represented or had standing to represent the "new" Ford class (pattern or practice group), since he was only a member of a private class of approximately thirty-five individuals. Mr. Ford was awarded back pay by the District Court and did not appeal for himself or any member of his original class. He has no standing to represent others.

Mr. Ford's suggestion that the order dated August 10, 1973, rather than the order dated May 2, 1973, is the "decision on the merits" referred to in Rule 23(c)(1) is frivolous. The May 2 order itself specifically states at paragraph 15 that it is a "final order and judgment" (A.40), and even a cursory examination of the 150 page (with appendices) May 2, 1973, order, as contrasted with the 5 page order of August 10, 1973, reveals that the decision on the merits in this case was the May 2 order and that the order of August 10 was merely a supplemental order dealing with apportionment of certain back pay awards and attorneys' fees. The Fifth Circuit, in the second sentence of its opinion, states: "The proceedings below culminated in a decree, entered May 2, 1973," (A.75).

Additionally, the order of May 2 must be, and the order of August 10 cannot be, the decision on the merits referred to by

Rule 23(c)(1) since only the May 2 decision describes "those whom the court finds to be members of the class" as required by Rule 23(c)(3). Even if "the decision on the merits" had been the August 10 order, which it was not, the amendment to the class on May 2 would still have been after trial and without notice, and would not have comported either with Rule 23(c)(1)'s further requirement that the class be defined "as soon as practicable after commencement of the action" or with due process of law.

Respondent's contention that petitioner's 23(c)(1) issue is premature is similarly unfounded. The Fifth Circuit specifically held the modification of the class in the May 2 decree to be "literally authorized by Rule 23," making the issue ripe for review by this Court. Respondent's further suggestion that petitioner suffered no surprise or prejudice by the substitution of the Ford class without notice after trial so that an appeal could be prosecuted (by officious intermeddler Ford) after the government withdrew its appeal is similarly without merit.

Respondent strains credulity in his attempt to draw distinctions from this Court's decision in *American Pipe v. Utah*, 414 U.S. 539 (1974) which cannot logically be made. Respondent maintains in effect that the filing of a class action no matter how limited in size and scope tolls a statute of limitations on behalf of a universe consisting of all persons who may ever be added as class members (i.e. on behalf of 2,700 employees at 8 plants other than where Mr. Ford worked). Petitioner believes a different result is mandated by *American Pipe*. In any event, the import of *American Pipe* on the case at bar warrants review by this Court.

In light of the misapplication of the burden of proof standard below by the Fifth Circuit and the inability of respondent Ford to meet the issues presented in the petition, review by certiorari is warranted, and in view of the nature of respondent

Ford's reply, petitioner respectfully suggests that a summary reversal may even be in order.

Respectfully submitted,

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